No. 02-634-CSX Title: Green Tree Financial Corp., nka Conseco Finance Corp., Petitioner
v.
Lynn W. Bazzle, etc., et al.

Docketed:
October 25, 2002 Court: Supreme Court of South Carolina

Entry	Date	Proceedings and Orders
	Oct 23 2002	Petition for writ of certiorari filed. (Response due November 24, 2002)
	Nov 25 2002	Brief amici curiae of American Bankers Association, et al. filed.
	Nov 25 2002	Brief of respondent Lynn W. Bazzle, et al. in opposition filed.
	Dec 10 2002	Reply brief of petitioner Green Tree Financial Corp., filed.
	Dec 11 2002	DISTRIBUTED for Conference of January 10, 2003
	Jan 10 2003	Petition GRANTED. SET FOR ARGUMENT April 22, 2003. **********
	Jan 15 2003	Respondents' suggestion of bankruptcy received.
	Jan 15 2003	Response requested to suggestion of bankruptcy. Response due on or before close of business Wednesday, January 22, 2003.
	Jan 16 2003	Petitioner's response to suggestion of bankruptcy received.
	Jan 21 2003	Motion DISTRIBUTED. January 21, 2003 (Page 15)
	Jan 21 2003	Notification of order annulling automatic bankruptcy stay received from counsel for petitioner.
	Jan 22 2003	Response of respondents to petitioner's letters received.
	Jan 23 2003	Letter from counsel for petitioner received.
	Feb 24 2003	Brief amicus curiae of Equal Employment Advisory Council filed.
	Feb 24 2003	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Feb 24 2003	Brief amicus curiae of Directv, Inc. filed.
	Feb 24 2003	Brief amicus curiae of National Council of Chain Restaurants filed.
	Feb 24 2003	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
	Feb 24 2003	Brief of petitioner Green Tree Financial Corp., nka Conseco Finance Corp. filed.
	Feb 24 2003	Brief amici curiae of American Bankers Association, et al. filed.
	Feb 24 2003	Joint appendix filed.
	Feb 24 2003	Brief amici curiae of New England Legal Foundation, et al. filed.
	Feb 24 2003	Brief amici curiae of New England Legal Foundation, et al. filed.
	Mar 3 2003	Record filed.
	Mar 10 2003	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Mar 11 2003	CIRCULATED.
	Mar 26 2003	Brief amicus curiae of AARP filed.

No. 02-634-CSX

Entry	Date	Proceedings and Orders
	Mar 26 2003	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Mar 26 2003	Brief amici curiae of Robert Belton and Law Professors filed.
	Mar 26 2003	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Mar 27 2003	Brief of respondents Lynn W. Bazzle, et al. filed.
	Apr 15 2003	Reply brief of petitioner Green Tree Financial Corp.,n/k/a Conseco Finance Corp.(TBP) filed.
	Apr 22 2003	ARGUED.

(1)

Supreme Court, U.S.
FILED

No. 02- 02 634 OCT 23 2002

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

October 23, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

150 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are listed in the caption of the decision of the Supreme Court of South Carolina. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioner is a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock is publicly traded. No publicly owned company owns ten percent or more of the stock of Conseco, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION	14
A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either	15

TABLE OF CONTENTS—continued

Page

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures 20

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts 23

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 4, 5

American Centennial Ins. Co. v. *National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991) 16

Baesler v. *Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) 16, 18

Bischoff v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002) 28

Blue Cross of Cal. v. *Superior Court*, 67 Cal. App. 4th 42 (1998) 12, 21, 22, 27

Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 12, 15, 16, 17, 26

Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) 25

Connecticut Gen. Life Ins. Co. v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771 (7th Cir. 2000) 17

Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 4, 5, 26

Del E. Webb Constr. v. *Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987) 16

Dickler v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992) 23

Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) 5, 24, 29

Dominium Austin Partners, LLC v. *Emerson*, 248 F.3d 720 (8th Cir. 2001) 18, 24

E.E.O.C. v. *Waffle House, Inc.*, 122 S. Ct. 754 (2002) 5

Eastman v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856 (Wis. Ct. App. May 29, 2002) 27

Episcopal Hous. Corp. v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979) 25

TABLE OF AUTHORITIES—continued

	Page
First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995)	5, 26, 29
Gammaro v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994)	18
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)	4
Glencore, Ltd. v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999)	17
Government of U.K. v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993)	16, 17, 25
Gray v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347 (C.D. Cal. Sept. 6, 2001)	28
Herrington v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001)	18
Howard v. *KPMG*, 977 F. Supp. 654 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 844 (2d Cir. 1999), *available at* 1999 WL 265022	18
Iowa Grain Co. v. *Brown*, 171 F.3d 504 (7th Cir. 1999)	16
Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001)	18
Keating v. *Superior Ct.*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984)	12, 21
Lackey v. *Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998)	9
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)	5, 29
McCarthy v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal., July 19, 1994)	28

TABLE OF AUTHORITIES—continued

	Page
Med Ctr. Cars, Inc. v. *Smith*, 727 So. 2d 9 (Ala. 1998)	18, 19
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983)	5, 26
New England Energy Inc. v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988)	22, 23, 29
Perry v. *Thomas*, 482 U.S. 483 (1987)	24
Powertel, Inc. v. *Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999)	19
Protective Life Ins. Corp. v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989)	16
Salvano v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298 (N.Y. 1995)	17
Southland Corp. v. *Keating*, 465 U.S. 1 (1984)	4, 14, 28
Stein v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001)	19
Volt Info. Scis. Inc. v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)	4, 5, 12, 24, 29
Weyerhauser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984)	16

STATUTES

9 U.S.C. §§ 1-16	2
§ 2	2, 4
§ 4	30
S.C. Code Ann. § 37-10-102(a)	7
§ 37-10-105	7

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES — Page

Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001 J. Disp. Resol. 1 27

Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 27

IN THE

Supreme Court of the United States

No. 02-

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

Petitioner Green Tree Financial Corp. ("Green Tree") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is published at 569 S.E.2d 349 (S.C. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-26a. The South Carolina Court of Common Pleas' Order confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and

appears at Pet. App. 27a-35a. The South Carolina Court of Common Pleas' Order confirming the final award in arbitration and denying Green Tree's motion to vacate in *Lackey* v. *Green Tree Financial Corp.* is unpublished and appears at Pet. App. 36a-54a. The final order and award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and award in arbitration in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

STATEMENT OF THE CASE

In its decision below, the Supreme Court of South Carolina rejected Green Tree's challenge under the FAA to two interrelated class-action arbitration awards. Those two awards require Green Tree to pay nearly $27 million in statutory damages, attorney's fees and costs to two classes consisting of a total of more than 3,700 individuals. Green Tree challenged those arbitral awards in the Supreme Court of South Carolina because the arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action procedures to be superimposed onto that arbitration agreement. In affirming these awards, the Supreme Court of South Carolina rejected that showing and issued a decision that deepened an already

mature judicial conflict on the question whether the FAA permits class-action procedures to be engrafted onto an arbitration agreement that does not, by its terms, provide for class-action arbitration.

The Supreme Court of South Carolina acknowledged that, on one side of this conflict, a majority of the federal courts of appeals have held that class-wide or consolidated arbitration proceedings cannot be imposed on an arbitration agreement that is "silent" as to those issues. Pet. App. 12a-13a (analyzing *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995)). The decision below also recognized that, on the other side of the conflict, the California Supreme Court and its appellate courts have ruled that class-action procedures can be imposed on arbitration agreements that are "silent" regarding the availability of class-action arbitration. Pet. App. 13a-16a (discussing *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-09 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998)). After analyzing these competing lines of precedent, the Supreme Court of South Carolina highlighted that "[t]he United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 22a.

Thereafter, the court rejected the approach taken by the *Champ* line of cases, adopted the "approach taken by the California courts in *Keating* and *Blue Cross*," and held that "class-wide arbitration may be ordered when the arbitration agreement is silent *if* it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a (emphasis added) (footnote omitted). The South Carolina Supreme Court's holding was based expressly upon its prior determination that "a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual . . . directive to do so." Pet. App. 21a. Because it had permitted "consolidation of appropriate claims where the

arbitration agreement is silent," the court held that it "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." Pet. App. 21a (internal quotation marks omitted).

As shown below, this case squarely presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated a substantial conflict among the federal courts of appeals and state appellate courts and courts of last resort. As a result, Green Tree respectfully submits that its petition for a writ of certiorari should be granted to allow this Court to address and resolve this important decisional conflict.

Statutory Background

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, *e.g.*, *Volt Info. Scis. Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded almost 20 years ago, and more recently has reaffirmed, that § 2 of the FAA applies both in state and federal courts. *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix*

Cos. v. *Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*).

Essential to Congress's goal of ensuring the enforcement of parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479).[1]

Arbitration "'is usually cheaper and faster than litigation.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Dean Witter*, 470 U.S. at 220; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). Nevertheless, the "basic objective" under the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." 514 U.S. at 947 (citations and internal quotation marks omitted). Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement . . . . notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.* v.

---

[1] *See also Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *see also E.E.O.C.* v. *Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) (quoting *Volt*, 489 U.S. at 479).

Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

A review of the proceedings leading to the two class-action arbitral awards and the decision of the Supreme Court of South Carolina is necessary to put this case in proper context.

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement with Green Tree to finance home improvements. The agreement entered into by the Bazzles contained an arbitration clause which provided, in pertinent part:

> ARBITRATION – All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration . . . .

Pet. App. 110a. The agreement, by its terms, dictates that it will be governed "by the Federal Arbitration Act," *id.*, and limits its scope to "disputes, claims, or controversies arising from or relating to *this* contract or the relationships which result from *this* contract." *Id.* (emphasis added). By limiting the arbitrator's authority to address claims or relationships that result from "*this* Contract," the agreement precludes consolidated or class-wide arbitration of disputes involving

other contracts. The arbitration agreement is reproduced in full at Pet. App. 110a-111a.

Notwithstanding their agreement to arbitrate, on March 25, 1997, the Bazzles filed an action against Green Tree in South Carolina state court alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. See S.C. Code Ann. §§ 37-10-102(a), -105. On April 21, 1997, the Bazzles filed an amended class-action complaint and, at the same time, a motion for class certification. In response to these pleadings, Green Tree sought a stay of the court proceedings (including the motion for class certification) and an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. On December 5, 1997, the trial court granted the Bazzles' motion for class certification (thereby denying Green Tree's motion for a stay of all proceedings) and entered an order compelling arbitration. Pet. App. 3a.[2]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings ordered by the trial court were administered solely by the arbitrator. On July 24, 2000, the arbitrator issued an award against Green Tree on behalf of a class of 1,899 individuals. The arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages," Pet. App. 69a, but he nevertheless imposed a class-wide "penalty" upon Green Tree of between $5,000 and $7,500 "per transaction," which resulted in a total award of $10,935,000 in statutory damages. *Id.* at 71a.

The arbitrator also awarded plaintiffs $3,645,500 in attorney's fees based upon not only their prosecution of the

---

[2] On March 17, 1998, the trial court denied Green Tree's motion to reconsider the order granting class certification. Green Tree filed an appeal challenging the trial court's order certifying a class for arbitration, but the appeal was dismissed by the court of appeals as interlocutory. Pet. App. 28a.

arbitration, but also, among other things, their lobbying efforts during the 1997 South Carolina legislative session. Pet. App. 77a, 79a. The arbitrator rejected Green Tree's showing that "if every hour submitted by Plaintiffs is allowed, a $3,000,000 attorney's fee award would result in an hourly rate exceeding $900.00 per hour." R. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed would not be returned to Green Tree, but instead would be tendered to charitable groups chosen by plaintiffs' counsel: "75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach." Pet. App. 79a.

The Bazzles filed a motion to confirm the award in the state trial court, and Green Tree sought to vacate the award. Green Tree showed that class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. On September 15, 2000, the trial court confirmed the arbitral award and denied Green Tree's motion to vacate. Pet. App. 34a. In its order, the trial court stated that it "previously ruled on Green Tree's motion for reconsideration of class certification" and saw "no basis to address the issue again." *Id.*

The Lackey Proceedings. Daniel Lackey (and his fellow class members) entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. These agreements contained an arbitration clause that is in all relevant respects identical to the arbitration agreement in the *Bazzle* proceeding. Pet. App. 19a n.18.

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and George and Florine Buggs commenced a class action against Green Tree in state court, also alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. Green Tree filed a motion seeking to compel arbitration, but the trial

court ruled that Green Tree's arbitration agreement was unenforceable. Pet. App. 5a-6a. Green Tree appealed, and the court of appeals reversed, holding that the arbitration agreement should be enforced. See *Lackey* v. *Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). Thereafter, the same arbitrator who was presiding over the *Bazzle* proceeding was appointed as arbitrator in the *Lackey* proceeding.

The *Lackey* plaintiffs expressly argued, based upon the decision of the trial court in the *Bazzle* proceeding, that the arbitration should proceed as a class-action arbitration. Pet. App. 5a-6a. Specifically, the *Lackey* plaintiffs contended that class-action arbitration should proceed because

> [i]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration . . . .

R. on Appeal at 516. The arbitrator accepted this argument. As a result, the arbitrator followed the approach mandated by the trial court in *Bazzle*, certified a class-wide arbitration and approved a class notice that was sent to class members.

On the merits, the arbitrator concluded that Green Tree had violated the attorney and insurance-agent notice preference requirements of South Carolina law. Pet. App. 91a. As in *Bazzle*, the arbitrator acknowledged that "plaintiffs as a class did not attempt to show actual damages," *id.* at 96a, but he nevertheless imposed a "penalty" of "$5,000 per transaction," for a total of $9,200,000 in statutory damages to the 1,840 class members, *id.* at 98a. The arbitrator also required Green Tree to pay $3,066,666 in attorney's fees (and $18,252 in costs), and, as in *Bazzle*, relied upon plaintiffs' counsel's lobbying efforts to justify a fee award that would compensate

plaintiffs' counsel at a rate in excess of $900.00 per hour. *Id.* at 105a-106a. Finally, as in *Bazzle*, the arbitrator concluded that any unclaimed funds would not be returned to Green Tree, but instead would be distributed to charitable organizations chosen by plaintiffs' counsel. *Id.* at 107a.

The trial court confirmed the award and denied Green Tree's motion to vacate. Green Tree timely appealed. Pet. App. 8a.

Decision of the Supreme Court of South Carolina

The Supreme Court of South Carolina assumed jurisdiction over the *Bazzle* and *Lackey* appeals and consolidated the proceedings. Pet. App. 2a. The court below first ruled that both arbitration agreements were "governed by the FAA." *Id.* at 11a & n.9. The court then addressed "the FAA's impact on class-wide arbitration." *Id.* at 11a. It noted that the "United States Supreme Court has not addressed" that issue, and "[t]hus, there is no binding precedent that this Court is obligated [to] follow." *Id.* The Supreme Court of South Carolina recognized, however, that "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent," whereas "the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent." *Id.* at 11a, 12a.

Although the arbitration agreements in these cases, by their terms, limit arbitration to "'disputes, claims, or controversies arising from or relating to *this contract*, or relationships which result from *this contract*,'" the court below concluded that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a (emphasis added by court). Specifically, the court ruled that this language "creates an ambiguity" that the court would construe against Green Tree to conclude that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.*

Given its determination that the agreement was "silent" as to the availability of class-action arbitration, the court

recognized that this case implicated the conflict between the rule in the *Champ* line of cases decided by the federal courts of appeals and the rule adopted by the California state courts. The court below rejected the *Champ* line of cases, explaining that the "United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 19a-20a. The court below explained that it previously had "held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." *Id.* at 21a (relying upon *Episcopal Hous. Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979)); see *id.* at 18a-19a. The court reasoned that because it "permits consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—"it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." *Id.* at 21a (internal quotation marks omitted).

Based upon this reasoning, the court below "adopt[ed] the approach taken by the California courts" and held "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. Although the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees, the court suggested that absent class-wide arbitration, "parties with nominal individual claims . . . would be left with no avenue for relief." *Id.* The court further concluded that class-action arbitration was appropriate because "hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." *Id.* Because the court concluded that the imposition of class-action procedures onto a "silent" arbitration agreement was a permissible, albeit

discretionary, option, it upheld the arbitral awards in both *Bazzle* and *Lackey*. *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

Further review by this Court of the decision of the Supreme Court of South Carolina is necessary to ensure the proper and uniform resolution of a recurring and important issue under the Federal Arbitration Act ("FAA") that has generated a substantial conflict among federal courts of appeals and state appellate courts and courts of last resort. Specifically, this case presents the question whether the FAA permits class-action procedures to be imposed on an arbitration agreement that is "silent" as to class-action arbitration.

The clear majority of courts that have addressed this question and the related issue of consolidation of arbitration proceedings have answered no. These courts have held that, under the FAA, the parties' silence on the question of class-action or consolidated arbitration precludes imposition of class-action or consolidated arbitration proceedings onto the parties' agreement. See, *e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing cases). In doing so, these courts have relied upon this Court's decisions, which hold that the FAA was designed to overcome judicial hostility to arbitration by mandating that arbitration agreements be enforced rigorously in accordance with their terms. See, *e.g.*, *Volt*, 489 U.S. at 478.

The Supreme Court of South Carolina acknowledged the clear rule of these cases, which prohibit class-action procedures from being superimposed on a "silent" arbitration agreement, but expressly rejected that rule in favor of the minority approach first embraced by the California courts. See, *e.g.*, *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-10 (1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998) (following *Keating* and rejecting *Champ* line of cases).

This minority approach holds that the FAA does not prohibit a court from imposing class-action or other procedures onto an arbitration agreement; rather, class-action procedures may be imposed, in the court's discretion, if they further the court's notions of judicial efficiency and equity. Pet. App. 13a-16a. Put another way, the minority approach permits courts to frustrate private agreements to arbitrate by allowing those agreements to be modified whenever they do not unambiguously preclude a procedure or result that a court, in its discretion, believes will "serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.

This minority approach ignores that the FAA is designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms. Moreover, the minority approach cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms. Indeed, under the minority approach adopted by the court below, parties' agreements to arbitrate would be subject to the same judicial hostility that the FAA was designed to combat when it was enacted more than 75 years ago. That result frustrates congressional intent that arbitration agreements must be enforced according to their terms. Further, adoption of this approach would increase the costs of private arbitration by obligating parties to draft long and unwieldy arbitration agreements that seek to anticipate and address every possible procedural contingency to prevent additional procedures from being imposed upon the parties' private agreement in the putative interests of judicial economy and efficiency.

Finally, the conflict implicated by the decision of the South Carolina Supreme Court is one of paramount importance because, without a uniform nationwide standard, the determination whether class-action arbitration can be compelled will turn on the happenstance of geography, rather

than the intent of parties as expressed in the terms of their arbitration agreements. A uniform national rule is vital because the same arbitration agreements often may apply to agreements entered across the country. Moreover, the absence of a uniform standard fosters not only geographic forum shopping but also forum shopping between federal and state courts. See *Southland*, 465 U.S. at 15 (rejecting interpretation of FAA that would "encourage and reward forum shopping").

In sum, certiorari should be granted to resolve this deep and recurring conflict and to adopt the majority view that the FAA mandates that arbitration agreements be enforced according to their terms and not on the basis of ambiguous policy choices of a court's making.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION.

The decision of the Supreme Court of South Carolina deepens a conflict among both state and federal courts on the recurring and important question whether the FAA permits class-wide arbitration where the parties' arbitration agreement is "silent," *i.e.*, it does not expressly provide for or against class-action arbitration. As shown below, the majority of courts, including the Seventh Circuit, Eighth Circuit and Alabama Supreme Court, have held that the FAA requires enforcement of private arbitration agreements according to their terms, and that courts therefore have no authority to order class-action arbitration where an arbitration agreement does not expressly provide for class-action arbitration. These decisions, in turn, are built on the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, which hold

that a court has no authority to order consolidated arbitration if the parties' agreement does not so provide.

In stark contrast, the minority position, adopted by the court below and other state courts, holds that if the parties' agreement is "silent" regarding class actions—because it does not expressly preclude them—a court may, in its discretion, superimpose class-action arbitration if consistent with its notions of efficiency and equity. The minority position relies, among other things, on a decision of the First Circuit that permits consolidated arbitration even if the parties' agreement does not provide for it. The minority courts invoke the proposition that the FAA leaves them free to order arbitration upon terms as they see fit, so long as they do not *directly* contravene any provision of an agreement and do not require resort to a judicial rather than arbitral forum.

A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either.

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that the FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure. *Id.* at 275. Relying on this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, the *Champ* court rejected the argument that class-action arbitration was permissible so long as it "would not contradict" the terms of the agreement. *Id.* at 274-75. Rather, the Seventh Circuit concluded that the FAA reflects a responsibility "to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Id.* at 277. In reaching that conclusion, the Seventh Circuit also rejected the argument that failure to certify a class would cause "various inefficiencies and inequities," explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the

parties' agreement as they wrote it, 'even if the result is "piece-meal" litigation.'" *Id.* (quoting *Dean Witter*, 470 U.S. at 221). Instead, the *Champ* Court explained that for the court to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." *Id.* at 275 (internal quotation marks omitted; alteration in original).

The *Champ* court followed the rationale underlying decisions of the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.[3] The *Champ* court explained that these circuits have held that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements" according to their terms barred consolidated arbitration "even where consolidation would promote the expeditious resolution of related claims." *Id.* at 274-75. The Seventh Circuit agreed with and "adopt[ed]" the reasoning of these cases, concluding that there was "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275; see also *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th

[3] *See Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (holding that "'the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration'"); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (same).

Cir. 1999) (explaining that "[b]ecause arbitration is based fundamentally on an agreement between the parties, the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration") (citations omitted); *cf. Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (7th Cir. 2000) ("the court has no power to order consolidation if the parties' contract does not authorize it").

In particular, the Seventh Circuit relied on the Second Circuit's decision in *United Kingdom*. *Champ*, 55 F.3d at 275. In *United Kingdom*, the Second Circuit concluded that there was no authority to "order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation." *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993). The Second Circuit based that conclusion on "recent Supreme Court case law" that it determined had "undermined [its] previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Id.* at 71; see *id.* at 72. Specifically, the Second Circuit explained that this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone* confirmed that the FAA mandates the enforcement of arbitration agreements in accordance with their terms, regardless of any countervailing considerations such as the court's "'own view of speed and economy.'" *Id.* at 73.[4]

[4] *See also Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266 (2d Cir. 1999) (applying *United Kingdom*, and the "trio of 1980's Supreme Court decisions" on which it relied, to vacate order of joint arbitration hearing); *cf. Salvano* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1302 (N.Y. 1995) (holding that FAA barred a trial court's use of state law to order expedited arbitration where the parties' arbitration agreement did not provide for such procedures and rejecting argument that an order to expedite was justified because the FAA "contains no provision *precluding* expedited arbitration") (emphasis added).

The Eighth Circuit follows the same reasoning as *Champ* to bar class arbitrations where the parties have not provided for them. See *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001). In *Emerson*, the Eighth Circuit explained that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." *Id.* Because an arbitration agreement must be enforced "'in accordance with its terms,'" the Eighth Circuit held that the district court acted properly in "compelling appellants to submit their claims to arbitration as individuals" where their agreement made "no provision for arbitration as a class." *Id.* at 728, 729; see also *Baesler*, 900 F.2d at 1195 (holding that district court was without power to consolidate arbitration proceedings when arbitration agreements were silent on the issue); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (holding that FAA required it to "give effect to the agreement of the parties," and therefore it had no authority to order class arbitration where the "arbitration agreement makes no provision for class treatment of disputes"), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994).[5]

Similarly, the Alabama Supreme Court expressly followed *Champ* in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998). There, the Alabama Supreme Court applied the FAA,

[5] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (citing *Champ* for the proposition that "it appears impossible" to pursue a class action in an arbitral forum "unless the arbitration agreement contemplates such a procedure"), *cert. denied*, 531 U.S. 1145 (2001); *Howard* v. *KPMG*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (concluding that "a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration"), *aff'd*, 173 F.3d 844 (2d Cir. 1999) (table), *available at* 1999 WL 265022; *Herrington* v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000) (relying on *Del E. Webb*, *Champ*, and *American Centennial* to grant motion to dismiss class-action allegations and compel arbitration), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table).

id. at 12-13, to reverse a trial court order permitting class arbitration. See *id.* at 20. The *Med Center* court concluded that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration." *Id.* at 20.

Finally, other state appellate courts have concluded that class-action procedures cannot be imposed where an arbitration agreement does not provide for them. For example, in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001), the Washington court relied upon *Champ* to support its decision to refuse to "compel class arbitration" where "the arbitration clause . . . is silent on class action." *Id.* In doing so, the *Stein* court noted that the "Washington Supreme Court has ruled that when an arbitration agreement is silent on consolidation, a court may not compel consolidated arbitration." *Id.* (citing *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 607 P.2d 856, 858 (Wash. 1980)).[6]

If this case had arisen in any of these jurisdictions, there would have been no order of class-action arbitration. The arbitration agreement in this case unquestionably does not provide for class-action arbitration. As a result, the courts in these jurisdictions would have concluded that, under the FAA, they had no authority to order class-action arbitration. The outcome-determinative ruling of the court below to the contrary warrants review by this Court.

[6] *Cf. Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 573-74, 576 (Fla. Dist. Ct. App. 1999) (relying upon *Champ* to rule that, under the FAA, court has no authority to compel class-action arbitration where the agreement did not provide for class arbitration).

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures.

As the Supreme Court of South Carolina acknowledged, there are "two different approaches" on the question presented here. Pet. App. at 11a. The court below expressly rejected the *Champ* line of cases, and instead adopted the minority position of the state courts in California and Pennsylvania (as supported by the First Circuit). Those courts hold that even if the parties to an arbitration agreement have not provided for class arbitration, the FAA does not prohibit such procedures from being superimposed on an arbitration agreement as a matter of "discretion." *Id.* at 15a.

In the decision below, the Supreme Court of South Carolina criticized *Champ* and *United Kingdom* for making "strict enforcement of the terms of the agreement" the paramount policy under the FAA. Pet. App. 13a. Instead of implementing the parties' intentions as expressed in the terms of their agreement, the court adopted precisely the reasoning that *Champ*, *United Kingdom*, *Med Center*, and other courts expressly have rejected. It held that, faced with an arbitration agreement that is "silent" regarding class arbitrations, class arbitration could be ordered, as a matter of discretion, if doing so "would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a. Although the class members in each of these arbitrations were awarded at least $5,000, plus attorneys' fees, the court below expressed concern that, under the majority position, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief," and that arbitrating numerous identical cases in multiple arbitrations would not "serve the interest of judicial economy." *Id.*

The ruling of the court below is built directly and expressly on "the approach taken by the California courts," Pet. App. 22a, particularly *Keating* v. *Superior Court*, 645 P.2d 1192 (1982), and *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998). In *Keating*, the California Supreme Court held, in a case under the FAA, that state law permitted a court to order class arbitration even where an arbitration agreement did not provide for it. 645 P.2d at 1209-10. The California Supreme Court acknowledged that "a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Id.* at 1209 (explaining that court "would have to make initial determinations regarding certification and notice to the class, and . . . . to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Nevertheless, the California Supreme Court concluded that the availability of class arbitration must be determined not based solely with regard to the parties' intent, but rather on an analysis of which procedure offers "a better, more efficient, and fairer solution." *Id.*

California appellate courts have built upon the analysis in *Keating* to hold that the FAA does not prohibit class-action procedures from being superimposed on an arbitration agreement that does not provide for class-wide arbitration. Specifically, the court in *Blue Cross* squarely held that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." 67 Cal. App. 4th at 46. The *Blue Cross* court rejected the majority position, concluding that if an order of class arbitration would not expressly contradict any terms of the arbitration agreement, a court was free to issue such an order under state law authorizing it. See *id.* at 60, 65. Whether to do so was a question for the discretion of the trial court. *Id.* at 64. The *Blue Cross* court concluded that the purpose of the FAA was simply "to abolish antiarbitration laws and to make

agreements to arbitrate specifically enforceable." *Id.* at 63. Because imposition of class-wide arbitration did not *prevent* arbitration, the court in *Blue Cross* reasoned that this approach did not violate this narrow goal of the FAA and therefore was not pre-empted. *Id.* at 64 ("[E]ven if a conflict exists between the AAA rules and classwide arbitration, the trial court may resolve the conflict. It is unlikely the AAA would refuse to abide by a court order for classwide arbitration.") (citations omitted). Indeed, the *Blue Cross* court thought its rule furthered the purpose of the FAA because it would "facilitate the enforcement of arbitration agreements by making classwide arbitration available in appropriate cases." *Id.* at 65.

The *Blue Cross* court, in rejecting *Champ* and the numerous federal circuit courts and state courts that prohibit class-action and consolidated arbitrations absent an agreement by the parties, instead followed the First Circuit's decision in *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988). See *Blue Cross*, 67 Cal. App. 4th at 58-60. In *New England Energy*, the First Circuit held that consolidated arbitration is permissible even where the arbitration agreement does not provide for consolidation, so long as a state law authorizes it. 855 F.2d at 3. In the First Circuit's view, the question was not whether the parties had agreed or consented to arbitration, but instead was whether consolidation was proper under the considerations required by state law. *Id.* at 7. Unless consolidation would "contradict[ ] the contractual terms," *id.* at 5, the FAA did not pre-empt a state law authorizing it, regardless of the parties' intent. The court reasoned that so long as a court order did not actually "divert a case from arbitration to court," it did not violate the FAA's purpose of ensuring that parties who agree to arbitration get an arbitration. *Id.* at 6-7. Within that minimal restriction, the First Circuit concluded that States were free to impose procedures as they saw fit: "We fail to see why a state should be prevented from enhancing the efficiency of

the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." *Id.* at 7.

Finally, *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992), also adopted the minority position. There, the appellate court held that a putative class-action litigation could be maintained as a class arbitration. *Id.* at 862. The court acknowledged that the FAA provided the applicable "standard for enforcing an arbitration agreement," *id.*, including the duty to enforce the parties' intentions, *id.* at 862-63, but it noted that the United States Supreme Court had not addressed the permissibility of "superimposing class-action procedures on the contract arbitration." *Id.* at 865. Like the other courts adopting the minority position, the Pennsylvania court did not limit itself to determining and applying the parties' intentions but rather invoked "the dual interest" of not only "respecting and advancing contractually agreed upon arbitration agreements," but also concerns of judicial efficiency and economy. *Id.* at 867.

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts.

This case presents a perfect vehicle for resolving the question whether class-action procedures may be superimposed upon an agreement that does not provide for class-action arbitration. The court below concluded that the arbitration agreements in the *Lackey* and *Bazzle* proceedings were "*silent* regarding class-wide arbitration," Pet. App. 19a, and recognized the conflicting lines of cases, *id.* It then expressly held that it would "adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold that class-wide arbitration may be ordered when the arbitration agreement is silent *if it would serve efficiency and equity, and would not result in prejudice.*" *Id.* at 22a (emphasis added). That decision was essential to the holding below because there can be no question that the arbitral awards in this case

could not have been affirmed if the Supreme Court of South Carolina had followed the *Champ* line of cases and thus concluded that class-action arbitration cannot be imposed where an arbitration agreement is silent.

Nor can the court below avoid this Court's review by suggesting that it relied upon "independent state grounds to permit class-wide arbitration." Pet. App. 20a. That suggestion simply ignores that the issue in this case is whether the FAA preempts the South Carolina Supreme Court's application of state law. Put another way, this case presents the issue whether the FAA preempts state-law that might allow class-action procedures to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA preempts state law is a federal question).[7] Indeed, this is a particularly good vehicle for resolving that dispute because, as the Supreme Court of South Carolina acknowledged, the arbitration agreement, by its terms, was governed by the FAA. Pet. App. 11a & n.9; compare *Dominium Partners*, 248 F.3d at 729 n.9 ("The construction of an agreement to arbitrate is governed by the FAA unless the agreement expressly provides that state law should govern."), with *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . .").

---

[7] *See Volt*, 489 U.S. at 475-76 (reviewing whether state-court interpretation of contract subject to FAA was consistent with the "federal policy" embodied in the FAA of "enforceability, according to their terms, of private agreements to arbitrate"); *id.* at 489 U.S. at 473 n. 4 (holding that question whether state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. § 1257); *cf. Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law "that takes its meaning from the fact that a contract to arbitrate is at issue" is pre-empted by § 2 of FAA); *Doctor's Assocs.*, 517 U.S. at 685 (same).

Moreover, the court's own reasoning confirms that this case squarely presents a significant *federal* question. In reaching its decision, the court plainly did not conclude that the parties, through their agreement to arbitrate, actually intended to permit class-action arbitration. Instead, the Supreme Court of South Carolina relied upon its prior decisions that held that "a state court may order *consolidation* of claims subject to mandatory arbitration *without any contractual or statutory directive to do so*." Pet. App. 21a (second emphasis added).[8] The court below reasoned that because these prior decisions permit consolidation of claims "where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—it also "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less *intrusion upon the contractual aspects of the relationship*." *Id.* (internal quotation marks omitted; emphasis added). In doing so, the court below explained that this "intrusion upon the contractual aspects of the relationship" was justified as a matter of state law "if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 21a, 22a (internal quotation marks omitted).

But that is precisely the reasoning and analysis that was rejected by decisions such as *Champ* when they held that to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the

---

[8] Specifically, the court's reliance on *Episcopal Housing Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979), confirms that this case directly implicates this substantial judicial conflict. In *Episcopal Housing*, the Supreme Court of South Carolina relied upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) ("*Nereus*"), to hold that consolidated arbitration may be ordered even if the arbitration agreement does not provide for consolidation. 255 S.E.2d at 451. But, as shown in Part I.A, *supra*., the Second Circuit has since held that its prior decision in *Nereus* has been "undermined" by "recent Supreme Court case law" and on the issue presented here "is no longer good law." *United Kingdom*, 998 F.2d at 71.

benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." 55 F.3d at 275 (internal quotation marks omitted; alteration in original); see also *supra* at 16 n.3 (collecting cases). In this regard, the South Carolina Supreme Court's reasoning and holding cannot be reconciled with the decisions of this Court which provide that the FAA leaves no room for judicial discretion in enforcement of agreements to arbitrate. See *Dean Witter*, 470 U.S. at 218-21; see *First Options*, 514 U.S. at 947; *Moses H. Cone*, 460 U.S. at 20.[9]

* * * *

There is a well developed and persistent conflict among the federal courts of appeals and state courts regarding the requirements of the FAA. On the one hand, the *Champ* line of cases makes clear that class-actions and consolidation cannot be imposed upon an arbitration agreement that does not expressly provide for them. Instead, these courts make clear that the FAA requires such agreements to be enforced rigorously in accordance with their terms. On the other hand, the *Keating* and *Blue Cross* line of cases (and the decision in this case) hold that the FAA requires only that arbitration agreements be enforced, but does not prohibit class-action or consolidation if such a process would, in the court's view, enhance the efficiency and economy of the arbitration. The decision below squarely presents this conflict, and it provides an ideal candidate for resolving this dispute among the lower federal courts and state courts.

---

[9] The Supreme Court of South Carolina simply was wrong in suggesting that a trial court's decision whether, and how, to enforce an arbitration agreement is "within the court's discretion." Pet. App. 22a. This Court's decision in *Dean Witter* explained that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which the arbitration agreement has been signed." 470 U.S. at 218.

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as the court below recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one State. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside. Indeed, even cases that have adopted the minority approach recognize that the FAA is designed to "prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases." *Blue Cross*, 67 Cal. App. 4th at 52.

In addition to the decisions discussed above that have expressly recognized this conflict, other courts have recognized and acknowledged this division of authority and its importance. For example, the Wisconsin Court of Appeals recently certified to its Supreme Court the question of class arbitration under the FAA, noting that "other state and federal jurisdictions have come to opposite conclusions" and that the question is of "substantial importance." *Eastman* v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856, at *3, *4 (Wis. Ct. App., May 29, 2002). Commentators agree that the availability of class-action and consolidated arbitration is "the subject of much litigation." Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001, J. Disp. Resol. 1, 15 (noting that issue of "class-action arbitration[]" is "hotly debated"); see also Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 711 nn.128,

129 (noting conflict among courts on availability of class-action arbitration and consolidated arbitration).

The importance of a uniform rule is magnified given the division of authority between forums in the same jurisdiction such as Pennsylvania and California. Pennsylvania state courts, relying on *Dickler*, permit class arbitration in the same circumstances in which Pennsylvania federal courts, relying on the Third Circuit's decision in *Johnson*, would prohibit it. Similarly, California state courts will permit both consolidated and class arbitration in the same circumstances in which California federal courts, following the Ninth Circuit's decision in *Weyerhauser*, would prohibit it. Indeed, although *Weyerhauser* involved consolidated arbitration, federal district courts in California rely on that case, *Champ*, and other cases in the majority to reject class-wide arbitration in circumstances where California state courts might permit it.[10]

This conflict is precisely what this Court sought to avoid in *Southland* because a lack of uniformity, particularly within the same State, "would encourage and reward forum shopping." 465 U.S. at 15. The Court rightly was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make that right dependent for its enforcement on the particular forum in which it is asserted." *Id.* For the same reason, review is necessary here.

Furthermore, the question presented implicates a broader, and equally critical, question whether it is permissible, absent the parties' expressed intent, to impose various procedures onto arbitration proceedings. The courts that have adopted

[10] *See Bischoff* v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); *Gray* v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347, at *2-*3 (C.D. Cal., Sept. 6, 2001); *McCarthy* v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal., July 19, 1994).

the minority view hold that, in the interests of judicial economy and efficiency, various procedures may be imposed upon the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to tread on parties' intentions but also, as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring them to become voluminous to preclude every imaginable supplement. Indeed, the First Circuit in *New England Energy* reasoned that *any* procedures could be imposed on an arbitration agreement so long as they preserved the ill-defined "informal operational procedures" that, in that court's view, are the only goal of private arbitration. 855 F.2d at 6 n.5.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, the Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id.* at 478, and "the FAA's primary purpose," *id.* at 479. Similarly, in *Doctor's Associates, Inc.* v. *Casarotto*, the Court reviewed a decision of the Montana Supreme Court and stated that "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. 681, 688 (1996) (alterations in original) (quoting *Volt*, 489 U.S. at 479). See also *Mastrobuono*, 514 U.S. at 53-54 ("[T]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms'") (quoting *Volt*, 489 U.S. at 479); *accord id.* at 57; *First Options*, 514 U.S. at 947 (same).[11]

[11] Because the parties' agreement in this case, by its terms, provided that it would be governed by the FAA, the Court need not determine

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

October 23, 2002

---

whether the substantive law reflected most clearly in § 4 of the FAA, 9 U.S.C. § 4, would apply by force of law to state courts. *Cf.* Pet. App. 19a-20a. In any event, as discussed above, this Court's cases make clear that the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court.

APPENDICES

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

Opinion No. 25523

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and for
all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORPORATION A/K/A GREEN TREE FINANCIAL SERVICES CORPORATION N/K/A CONSECO FINANCE, INC.,
Appellant.

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class and for
all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP., A/K/A GREEN TREE FINANCIAL SERVICES CORP., A/K/A GREEN TREE ACCEPTANCE CORP., N/K/A CONSECO FINANCE, INC.,
Appellant.

Heard March 21, 2002,
Filed August 26, 2002

JUDGES: CHIEF JUSTICE TOAL. MOORE, WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

OPINION

CHIEF JUSTICE TOAL: Two classes of plaintiffs, represented by Lynn and Burt Bazzle, et. al. ("Bazzles") and by Daniel Lackey, et. al. ("Lackey"), were awarded damages pursuant to their respective class action arbitrations against Green Tree Financial Corporation ("Green Tree") for violations of the South Carolina Consumer Protection Code.[1] Green Tree appeals the arbitrator's [2] awards in both cases, on grounds that class-wide arbitration of the plaintiffs' claims was not authorized by the arbitration agreement.

FACTUAL/PROCEDURAL BACKGROUND

On February 22, 2001, this Court entered an Order withdrawing Green Tree's appeal from the Court of Appeals. By that order, this Court assumed jurisdiction and consolidated the *Bazzle* and *Lackey* cases for appeal. Although each case proceeded through arbitration independently, resolution of each appeal involves the same novel issue: whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions.

Bazzle

The Bazzles (like their fellow class members) were approached by Patton General Contracting ("Patton"), a non-exclusive Green Tree dealer, in 1995, to perform home improvements. Patton provided the Bazzles with a Green Tree application for financing. The Green Tree application contained no attorney or insurance agent preference notice. On May 20, 1995, the Bazzles executed a Retail Installment Contract and Security Agreement for $15,000 which

[1] S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

[2] The same arbitrator heard both cases separately.

contained the arbitration clause at issue.[3] The same day the Bazzles executed a number of other documents identifying Green Tree as the lender, including a mortgage stamped with directions to return it to Green Tree once executed. The Bazzles were never given an attorney or insurance preference form and no attorney was involved in the transaction or closing on their behalf.

On March 25, 1997, Lynn and Burt Bazzle commenced an action against Green Tree in the Dorchester County Court of Common Pleas based on Green Tree's alleged violations of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code [4] arising out of their home improvement financing agreement with Green Tree.

On April 21, 1997, the Bazzles filed an amended complaint incorporating class allegations and a Motion for Class Certification. A month later, Green Tree filed a Motion for Stay and to Compel Arbitration. On December 5, 1997, the trial court heard both motions. It granted the Motion for Class Certification. After the court granted class certification, Green Tree pursued its Motion to Compel Arbitration, and the trial court granted it.

The trial court issued two separate orders memorializing its rulings on December 5, 1997: (1) an order granting class certification; and (2) an order compelling arbitration. In its order compelling arbitration, the trial court stated that the order applied to the Bazzles and all members of their class

[3] The arbitration clause does not mention class actions in arbitration or otherwise, but Green Tree argues the singular language of the clause stating claims relating to "*this* contract . . . will be resolved by binding arbitration by an arbitrator selected by us with the consent of *you*" precludes class-wide arbitration. (emphasis added). Green Tree does not concede that the agreement is "silent."

[4] S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

who elected to be part of the action. In a supplemental order issued January 7, 1998, the trial court ordered that the class action in arbitration proceed on an opt-out basis.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the trial court's order granting class certification. After a hearing, the trial court denied Green Tree's Motion for Reconsideration, and Green Tree filed an appeal. On April 28, 1998, the Court of Appeals dismissed Green Tree's appeal on grounds that granting or denying class certification is interlocutory and non-appealable. Green Tree filed a Petition for Rehearing. The Court of Appeals denied rehearing and Green Tree filed a petition for certiorari with this Court. This Court denied Green Tree's petition and remitted the case to the trial court.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of an Arbitrator. On May 6, 1999, Green Tree filed a Motion to Dismiss on grounds that the Bazzles were not the proper parties to pursue the claims asserted, as their interests were contrary to the interests of the class members. On May 20, 1999, the trial court heard both motions. The trial court appointed the Honorable Thomas Ervin as arbitrator and declined to hear the Motion to Dismiss for lack of jurisdiction.

All class action proceedings were thereafter administered by the arbitrator, without further involvement of the trial court. The arbitrator handled several motions by the parties before holding the final hearing on May 31, 2000. On July 24, 2000, the arbitrator issued a Final Order and Award, finding Green Tree liable for violating the attorney and insurance preference statute, S.C. Code Ann. § 37-10-102(a). The arbitrator found the remedies for such a violation to be in S.C. Code Ann. § 37-10-105 (Supp. 1996 & 1997) and awarded relief to the class of 1,899 individuals in the amount of $10,935,000, and an additional $3,645,500 in attorney's fees and $18,242 in costs.

On July 25, 2000, the Bazzles filed a Motion to Confirm the Award in the trial court. On August 24, 2000, Green Tree filed a Motion to Remand the Award for Amendment and Clarification, an objection to the Motion to Confirm, and a Motion to Vacate the Award. On September 15, 2000, the trial court confirmed the award and denied Green Tree's motions to remand and vacate. Green Tree appealed and this Court assumed jurisdiction to hear the consolidated appeals.

Lackey

Daniel Lackey (and his fellow class members) entered into preprinted consumer installment contracts and security agreements with Green Tree for the purchase of mobile homes. These transactions were secured by real property and were subject to the South Carolina Consumer Protection Code. In each of these transactions, the consumer completed a Green Tree application for financing through a Green Tree dealer. The applications contained no attorney or insurance preference notice and no preference form was provided at any other time during the transaction.

Green Tree, not its dealers, notified the consumer whether credit had been granted or denied. If granted, Green Tree set the terms, including the interest rate, and prepared a mortgage and note. The mortgages were delivered to the consumer through the dealer, but were returned directly to Green Tree. The notes and mortgages were assigned to Green Tree. Green Tree funded the transaction after the consumer reported satisfaction with the set up of the mobile home and then issued checks to the dealer.

On May 28, 1996, Daniel Lackey and George and Florine Buggs commenced a *class* action against Green Tree in the Barnwell County Court of Common Pleas. The Lackey plaintiffs, like the Bazzles, alleged violations of the attorney and insurance preference provisions of the South Carolina Consumer Protection Code.

Green Tree filed its answer and the Lackey plaintiffs proceeded to file a Motion for Class Certification. Green Tree moved to Stay the Matter and to Compel Arbitration. The trial court denied Green Tree's Motion to Compel Arbitration, finding Green Tree's contract was an adhesion contract with an unconscionable and unenforceable arbitration clause. Green Tree appealed and the Court of Appeals reversed. Although the Court of Appeals agreed that the contracts were ones of adhesion, it found that the arbitration clause within them was not unconscionable. *Lackey, et. al. v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Following remand, the parties entered into a Consent Order appointing the Honorable Thomas Ervin as arbitrator. Apparently, the arbitrator raised the issue of class action arbitration and held a hearing to determine whether a class action could proceed under Green Tree's arbitration clause.[5] The Lackey Plaintiffs claim Green Tree sought a decision by the arbitrator at the hearing that the class action could not proceed in arbitration. Green Tree, however, claims its involvement was limited to vigorous objection that the arbitrator did not have authority to order class arbitration under the Federal Arbitration Act[6] ("FAA") and the arbitration agreement. After a hearing on the matter, the arbitrator issued an order permitting class action arbitration and scheduled a class certification hearing.

On September 22, 1998, Green Tree initiated a declaratory judgment action in federal district court, seeking to enjoin the

[5] Although the Lackey plaintiffs moved for class certification in the trial court before Green Tree moved to compel arbitration, the trial court never addressed the motion because it refused to compel arbitration. As discussed, its decision was reversed and the matter was remanded for arbitration before the motion to certify the class was ever considered.

[6] 9 U.S.C. §§ 1-208 (1994).

arbitrator from certifying a class. After a hearing, the district court denied the injunction and dismissed the declaratory judgment action for lack of subject matter jurisdiction.[7]

On November 28, 1998, the arbitrator held the hearing on class certification. Green Tree's counsel was present but refused to participate in the argument of the motion. The arbitrator found the requirements for class certification were met. In December 1998, Green Tree filed an action for Declaratory Judgment and Preliminary Injunction in state court and a Motion to Stay the arbitration proceedings. After a hearing, the trial court denied the stay on the ground it lacked jurisdiction to interfere with the arbitration.[8]

After a hearing in May of 1999, the arbitrator approved a class notice that was sent to the class members on May 12, 1999. On January 28, 2000, the arbitrator held a pre-trial conference. At the conference, the parties entered into a Consent Agreement redefining the Lackey class to include all mobile home transactions and placing all home improvement class members in the Bazzle class.

The arbitrator heard the Lackey claims on March 6-8, 2000. Green Tree participated, offering witnesses and evidence. At the conclusion, the arbitrator ruled orally that Green Tree had violated the attorney and insurance agent preference requirements of the Consumer Protection Code. The arbitrator awarded $9,200,000 for violation of the attorney and insurance preference statute, and an additional $3,066,666 in attorney's fees and $18,252 in costs. On May 31, 2000, the same arbitrator heard the Bazzle home

[7] Significantly, the district court noted that even if it had jurisdiction, it would decline to intervene in the proceeding before the arbitrator as section 4 of the FAA only authorizes a party to petition a federal court when it has been aggrieved by the refusal of another to arbitrate.

[8] The trial court noted in its order that it found class actions and arbitration to be compatible.

improvement claims and again held Green Tree violated the attorney and insurance preference provisions. At this hearing, the arbitrator established the procedures for Green Tree to address its offset claims in both *Bazzle* and *Lackey*.

On July 24, 2001, the Lackey Plaintiffs filed a motion to confirm the award in trial court. In response, Green Tree filed a Motion to Remand and a Motion to Vacate the award. In December 2001, the trial court confirmed the award. Green Tree appealed and this Court withdrew the appeal from the Court of Appeals and assumed jurisdiction to hear the consolidated *Bazzle* and *Lackey* appeals.

Although the *Bazzle* and *Lackey* cases involve financing for different purposes, Green Tree structured and conducted the transactions in the same manner. The consumers in both classes were bound to arbitration by the same clause which appeared in their Retail Sales Agreements. Procedurally, however, the two cases differ in how class certification was granted. As discussed, in *Bazzle*, the trial court certified the class and then granted Green Tree's Motion to Compel Arbitration. The Lackey suit was filed as a class action in trial court, but arbitration was compelled before the motion to certify the class was considered although the Lackey plaintiffs did make a Motion to Certify the Class. Thus, the arbitrator authorized class certification within the arbitration. The cases have been consolidated and Green Tree appeals the following issues:

I. Did Green Tree waive its ability to object to class-wide arbitration in *Bazzle* and *Lackey* by manifesting consent to the class-wide arbitration?

II. Did the trial court in *Bazzle* and the arbitrator in *Lackey* have contractual or legal authority to authorize the respective arbitrations to proceed on a class action basis?

III. If so, were the due process rights of the absent class members sufficiently protected?

LAW/ANALYSIS

I. Waiver

The Bazzle and Lackey plaintiffs argue this Court can avoid addressing the broad issue of whether class-wide arbitrations were permissible by affirming on the alternate ground that Green Tree manifested consent to class-wide arbitration and may not now object to it. We are not convinced by this waiver argument.

The courts of this state have recognized that a party cannot complain when it receives the relief for which it has asked. *See McKissick v. J.F. Cleckley & Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995). Specifically, a party that by its conduct consents to arbitration of a dispute waives any subsequent judicial challenge to its arbitrability. *See Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330 (4th Cir. 1999). Although this is an accurate statement of the law, Green Tree did not consent to class-wide arbitration by defending itself in the arbitration. As discussed, Green Tree protested class-wide arbitration vigorously in both cases, receiving adverse rulings every time, before defending itself on the merits.

In *Bazzle*, Green Tree requested arbitration and received it after the motion to certify the class was granted by the trial court. Even after the trial court certified the *Bazzle* class, Green Tree continued to push for arbitration, and the trial court granted Green Tree's Motion to Compel arbitration. The Bazzles therefore contend that Green Tree got what it asked for and cannot now complain that the court abused its discretion by granting the relief it requested. Although Green Tree did object to the class-wide arbitration before the arbitrator, the Bazzles contend it waived its ability to object by

manifesting consent to proceed through some of its subsequent actions. For example, the Bazzles point to Green Tree's Motion to Decertify the class before the arbitrator on substantive grounds as evidence that Green Tree manifested consent to the arbitrator's authority to certify or decertify the class. The Bazzles claim that by placing the decertification issue squarely before the arbitrator, Green Tree manifested acceptance of the arbitral forum as sufficient to resolve the issue.

In *Lackey*, the plaintiffs argue similarly that Green Tree waived its right to object to class-wide arbitration by moving to compel arbitration when it knew of the class allegations being asserted. They argue that moving to compel arbitration without insisting that the trial court address the class certification motion manifested consent for the arbitrator to decide the certification issue. The Lackey plaintiffs assert that Green Tree did not object with motions and stays until after the arbitrator ruled against Green Tree on the general issue of whether this action could possibly proceed as a class-wide arbitration. The Lackey plaintiffs claim Green Tree was obligated to force the trial court to decide the Lackey plaintiffs' motion before it granted Green Tree's Motion to Compel because Green Tree was aware of the class allegations and knew the arbitrator would decide the issue if the trial court did not.

We are not persuaded by the plaintiffs arguments for waiver in *Bazzle* or *Lackey*. In *Bazzle*, Green Tree argued against the Motion to Certify before the trial court, lost, and then filed a Motion for Reconsideration of the issue. The Motion for Reconsideration was denied and Green Tree appealed the denial all the way to this Court. In *Lackey*, although Green Tree did not insist the trial court decide the issue before arbitration was compelled, it objected vigorously to the possibility of class certification at the first hearing on the matter before the arbitrator and filed actions to enjoin class certification in federal and state court. Green Tree's

motions in both cases were entirely unsuccessful, but, nonetheless, manifested Green Tree's objection to class-wide arbitration sufficiently to counter the plaintiffs' waiver argument.

II. Class Action Arbitration

In these consolidated cases, Green Tree argues the trial court and the arbitrator failed to enforce Green Tree's arbitration clause in accordance with its terms, in violation of the FAA, when they imposed class-wide arbitration.

The parties do not dispute that the FAA applies to the arbitration agreements in both cases.[9] The arbitration agreements expressly state that they are made pursuant to transactions in interstate commerce and are governed by the FAA. Although they agree the FAA applies, the parties dispute how the FAA impacts the class-wide arbitration question.

The United States Supreme Court has not addressed the FAA's impact on class-wide arbitration, although it was presented with an opportunity to do so in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[10] Thus, there is no binding precedent that this Court is obligated follow [sic]. Courts in other jurisdictions have addressed the issue, and have taken two different approaches. Several federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their

---

[9] In a separate action against Green Tree, this Court previously held Green Tree's arbitration clause was governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). The same arbitration clause is at issue here.

[10] This was an appeal from an opinion of the California Supreme Court in which, among other things, the California Court held class-wide arbitration permissible under state law when the arbitration agreement was silent regarding class action arbitration. *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (Cal. 1982).

interpretation of section 4 of the FAA.[11] Representing the opposing view, the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent.[12]

A. Seventh Circuit Approach

Green Tree urges the Court to adopt the reasoning employed by the Seventh Circuit, holding courts lack authority to order class-wide arbitration under section 4 of the FAA. 9 U.S.C. § 4. Section 4 requires arbitration in "accordance with the terms" of the agreement. If the arbitration agreement in question is silent on the issue, these courts reason that authorizing class-wide arbitration would not be in "accordance with the terms" of the agreement. *See Champ v. Siegel Trading Co., Inc.; McCarthy v. Providential Corp., et. al.*, 1994 WL 387852 (N.D. Cal.); *Gammaro v. Thorp Consumer Discount Co.*, 828 F.Supp. 673 (D. Minn. 1993). These courts support their decisions by drawing an analogy between ordering *class-wide* arbitration and ordering *consolidation* in arbitration.[13] *Id.*; *Med Ctr. Cars, Inc. v. Smith*, 727 So.2d 6 (Ala. 1998) (finding the federal authority persuasive and applying the consolidation analogy to class-wide arbitration in Alabama state courts).

In *Champ*, a class action alleging violations of the Commodity Exchange Act, RICO, and other state laws, the Seventh Circuit found "no meaningful basis to distinguish

[11] This federal approach was first enunciated by the Seventh Circuit in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995).

[12] The California approach was first enunciated in *Keating v. Superior Court*.

[13] Several federal circuits have refused to order consolidation of arbitration when the agreement is silent regarding consolidation. *See Government of United Kingdom v. Boeing, Co.*, 998 F.2d 68 (2d Cir. 1993); *American Centennial Ins. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990).

between the failure to provide for consolidated arbitration and class arbitration." 55 F.3d at 275. Based on this comparison, the *Champ* court adopted "the rationale of several other circuits and [held] that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.*; *Boeing; National Cas.; Baesler.* In reaching their decision in the consolidation cases, the various courts placed strict enforcement of the terms of the agreement above the policy favoring expeditious resolution of claims. *Champ*.

Citing a decision by the Second Circuit, the *Champ* court noted that the FAA's overriding goal was to place private arbitrations on the same footing as other contracts negotiated between private parties. *Champ* (citing *United Kingdom v. Boeing*, 998 F.2d 68 (2d Cir. 1993)). In furtherance of this goal, the Second Circuit held the duty to enforce the agreement as the parties wrote it to be tantamount, regardless of "possible inefficiencies created by such enforcement." *Champ*, 55 F.3d at 275 (citing *Boeing*, 998 F.2d at 72). The *Champ* court, however, failed to discuss whether the arbitration agreement was one of adhesion or was truly *negotiated* by the parties, and failed to discuss the differences between consolidation and class-action on a practical level.

B. California Approach

The California Supreme Court, on the other hand, did consider whether a trial court could order class-wide arbitration under adhesive but enforceable franchise contracts in *Keating*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360, *rev'd in part on other grounds* in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[14] The Califor-

[14] The United States Supreme Court declined to reach this issue, finding that the California Supreme Court's decision was based entirely on state law and raised no federal question for them to review (e.g., whether

nia court concentrated on the negative implications of refusing to allow class-wide arbitration when arbitration has been made mandatory through an adhesion contract:

> If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial. Arbitration proceedings may well provide certain offsetting advantages through savings of time and expense; but, depending upon the nature of the issues and the evidence to be presented, it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, [sic] of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources.

Keating, 31 Cal.3d at 609.

The California Supreme Court, like the Seventh Circuit, drew an analogy between ordering consolidation and class-wide arbitration to support its decision. In 1982, when *Keating* was decided, the Second Circuit permitted consolidation where the agreement was silent. *Compania Espanola de Pet., S.A. v. Nereus Ship*, 527 F.2d 966 (2d Cir. 1975), *cert. denied* 426 U.S. 936, 96 S. Ct. 2650, 49 L. Ed. 2d 387 (1976). The Second Circuit has reversed itself on this issue since *Keating*, however, and now holds that ordering consolidation when the arbitration agreement is silent violates section 4 of the FAA. *United Kingdom v. Boeing*. Nonetheless, the California court's analysis remains viable; although it drew an analogy between permitting consolidation and class-wide arbitration

---

or not the FAA prohibited class-wide arbitration in these circumstances). *Southland*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1.

when the contract is silent, it also distinguished the two, making its case for class-wide arbitration even stronger.

The California court pointed out that consolidated arbitration often involves a "tripartite relationship in which the parties in dispute each have a contract with a third party, but not with each other," as opposed to class-wide arbitrations in which all plaintiffs had a contract directly with the defendant. *Keating*, 31 Cal.3d at 612. Highlighting the greater burden likely to result from ordering consolidation, the California court explained:

> Thus, a party may be forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he had not agreed to.
>
> In these respects, an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship.

Id. Unlike parties subjected to consolidation, "the members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted." *Id.* Balancing the potential inequities and inefficiencies against resulting prejudice to the drafting party, the California court held that it was not beyond the court's authority to order class-wide arbitration in the appropriate case. The court thus left the question for the trial court to answer on a case by case basis, in its discretion, upon consideration of certain factors.[15]

More recently, the California Court of Appeal for the second district reaffirmed the California Supreme Court's holding in *Keating*. *Blue Cross v. Superior Court*, 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779 (Cal. App. 1998), *cert.*

---

[15] The factors that should be considered include efficiency, equity, and prejudice to the drafting party likely to result from class-wide arbitration. *Keating*.

denied 527 U.S. 1003, 119 S. Ct. 2338, 144 L. Ed. 2d 235 (1999). The Court of Appeal discussed the rationale employed by the California Supreme Court in *Keating* extensively, and upheld the court's ruling in *Keating* on state *and* federal law grounds. *Blue Cross.* Going further than the California Supreme Court, the Court of Appeal addressed the impact of the FAA on this issue, concluding that it does not preclude application of California's class-wide arbitration rule. *Id.*

First, the Court of Appeal held that section 4 of the FAA does not apply to state courts at all. For support, the court cited the legislative history of the FAA and several decisions of the United States Supreme Court. *Id.* (citing *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA apply to state courts). The Court of Appeal reasoned that the language of section 4 contemplated a petition before a district court and application of the federal rules of civil procedure. 67 Cal. App. 4th at 60 (citing *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal.4th 394, 926 P.2d 1061, 58 Cal. Rptr. 2d 875 (Cal. 1996)). The court recognized the FAA would prevail over a state procedural rule if in direct conflict, but found that a state procedure that furthers "the effectuation of the federal law's objectives" would not conflict and should be followed. 67 Cal. App. 4th at 61 (quoting *Rosenthal*, 14 Cal.4th at 410). The court concluded that following state precedent allowing class-wide arbitration can further rather than defeat the FAA's goal of enforcing agreements to arbitrate and is, therefore, not preempted by section 4 of the FAA. *Blue Cross.*[16]

[16] The court also addressed the consolidation argument and drew an analogy to consolidation despite the Second Circuit's reversal of its decision relied upon by the California Supreme Court in *Keating*. The Court of Appeal cited a decision by the First Circuit permitting consolidation where the agreement was silent, finding its reasoning to be more persuasive than those circuits (Second, Fifth, Sixth, and Eleventh) that prohibit consolidation where the agreement is silent. *Blue Cross* (citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) *cert. denied* 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 832 (1989)). The Third Circuit has adopted *Champ* since *Blue Cross* was decided. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

C. Relevant South Carolina Law

This Court has not considered whether or not class-wide arbitration may be ordered when the arbitration agreement is silent. Generally, however, this Court favors arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). Further, our courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Towles v. United Health Care Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). This Court examined the arbitration clause at issue last year in *Munoz v. Green Tree Financial Corp*, 343 S.C. 531, 542 S.E.2d 360 (2001). In *Munoz*, this Court held "general principles of state law apply to arbitration clauses governed by the FAA." 343 S.C. at 539, 542 S.E.2d at 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)).

Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings. *Id.*

The United States Supreme Court has applied this common-law rule of contract construction, construing ambiguous language against the drafting party in a case involving arbitration issues. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, a suit brought by customers of a securities brokerage firm, the Court permitted an arbitration panel to award punitive damages although the arbitration agreement was silent regarding punitive damages, but contained a choice of law provision which the brokerage firm claimed prohibited the arbitrator from awarding punitive damages. 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). The Court framed the question presented in broad terms, asking whether the award of punitive damages was consistent with the FAA's purpose of ensuring arbitration agreements are "enforced according to their terms." *Mastrobuono*, 514 U.S. at 54, 115 S. Ct. at 1214, 131 L. Ed. 2d at 82. The Court found the choice of law provision introduced an ambiguity into an agreement that would otherwise permit punitive damage awards. The Court then resolved the ambiguity against the brokerage firm as the drafting party, based on the federal policy favoring arbitration[17] and the common-law rule of contract interpretation construing ambiguous language against the drafting party. *Mastronbuono.*

Although this Court has not addressed whether class-wide arbitrations are permissible when the agreement is silent, this Court has considered whether consolidation of arbitration is permissible. In *Episcopal Housing Corp. v. Federal Ins. Co.*, this Court authorized consolidation of the claims of plaintiff (owner of an apartment complex) against an architect and builder absent contractual or statutory authority. 273 S.C. 181, 255 S.E.2d 451 (1979). In sum, this Court held, "[w]hile

[17] The *Mastrobuono* Court cited its opinion in *Volt Info. Sciences v. Leland Stanford Jr. U.* for the proposition that ambiguities as to the scope of the arbitration clause should be resolved in favor of arbitration. *Volt*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

we recognize that arbitration is a creature of contract, appellant would not be denied its contracted-for right to arbitration; rather the consolidation would provide a logical, expeditious method by [w]hich to enforce that right." *Episcopal Housing*, 273 S.C. at 183-84, 255 S.E.2d at 452. Significantly, the Court considered whether the objecting parties had demonstrated any prejudice which would result from consolidated proceedings and found that they had not. *Id.* The Court of Appeals applied *Episcopal Housing's* prejudice analysis in a more recent decision, and this Court has not revisited the issue. *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988).

D. Application to *Bazzle* and *Lackey*

As a preliminary matter, we find Green Tree's arbitration clause was *silent* regarding class-wide arbitration. Certainly, the clause does not mention class-wide arbitration, but Green Tree argues that the language limits arbitration to claims by individuals. Green Tree relies on the portion of the clause providing for arbitration of "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*." [18] In our opinion, this language does not limit the arbitration to non-class arbitration. At best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree.

Still, Green Tree contends this Court must follow the federal precedent established by the Seventh Circuit in *Champ*. Green Tree argues that this Court is obligated to follow *Champ*, as a matter of federal substantive law, mandated by section 4 of the FAA. We disagree. The United

[18] The arbitration agreements contained in the Retail Sales Agreements in *Bazzle* and *Lackey* are identical except for one word. The *Bazzle* clause says the arbitrator will be selected by Green Tree "with the consent of *you*" and the *Lackey* clause says "with the consent of *Buyer[s]*." (Emphasis added).

States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court. Although Green Tree asserts that the Fourth Circuit *recognizes* that the FAA *requires* non-class arbitration, we believe Green Tree is incorrect. The Fourth Circuit has not addressed the issue directly; the Fourth Circuit has cited *Champ*, but only in dicta, and the question of class-wide arbitration resolved in *Champ* has not been before the Fourth Circuit. *See Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999).[19]

Moreover, whether section 4 of the FAA applies in state court is debatable. Section 4 provides, "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition a *United States district court* . . . ." 9 U.S.C. § 4. As noted by the California Court of Appeal in *Blue Cross*, this language contemplates enforcement in the federal district court, not state court, and the United States Supreme Court has not held that section 4 applies in state courts to counter the plain meaning of the statute. *See Volt*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA applied to state courts).

In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general

[19] In *Deiulemar Compagnia*, the Fourth Circuit cited *Champ* in its discussion of the application of Rule 81 of the Federal Rules of Civil Procedure ("FCRP") in determining arbitrability. Specifically, the court held, "[t]he lesson of *Champ* . . . is that Rule 81(a)(3) does not affirmatively authorize application of the federal rules to matters that are incident to an arbitrable dispute." *Deiulemar Compagnia*, 198 F.3d at 483. Class-wide arbitration was not an issue in *Deiulemar Compagnia*, and this Court is still free to adopt the position that the FAA does not prohibit a state court from ordering class-wide arbitration where the agreement is silent.

principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. "As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions." [20] No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so. *Episcopal Housing Corp. v. Federal Insurance Co.; Plaza Development Services v. Joe Harden Builders* (holding that a court has authority to order consolidation when it would serve to expedite the parties contracted-for right of arbitration and the parties have not demonstrated prejudice would result).

The rationale employed by *Champ* that Green Tree urges this Court to adopt is based on an analogy between ordering consolidation and class-wide arbitration where the agreement is silent. *Champ* grounds its decision to prohibit class-wide arbitration almost entirely on the precedent of other courts prohibiting consolidation of arbitration absent an explicit right to consolidate within the written agreement. Applying this precedent in South Carolina results in the opposite outcome. Since this Court permits consolidation of appropriate claims where the arbitration agreement is silent, it follows that this Court would permit class-wide arbitration, as ordering class-wide arbitration calls for "considerably less intrusion upon the contractual aspects of the relationship." 42 Wm & Mary L. Rev. 1, 86-87. As the California Court noted in *Keating*, the members of a class would be parties to an agreement with the defendant, as opposed to consolidated

[20] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm & Mary L. Rev. 1, 83 (Oct. 2000).

parties, who each have a contract with a third party but not with each other. *Id.; Keating.*

Today, we adopt the approach taken by the California courts in *Keating* and *Blue Cross,* and hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice.[21] If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.[22] Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.

In South Carolina, a trial court's ruling on whether an action is properly maintainable as a class action is within the court's discretion. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). Therefore, a court's decision whether or not to certify a class is reviewed under an abuse of

---

[21] Although this present case does not raise this question, we note that preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract.

[22] Apparently, even the courts which prohibit class-wide arbitration when the agreement is silent acknowledge that class-wide arbitration *can* be accomplished as a practical matter. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (stating that it appears impossible for a class action to be pursued in an arbitral forum "unless the arbitration agreement contemplates such a procedure").

discretion standard. *Id.* Neither the trial court nor the reviewing court may look to the merits when determining whether to certify a class. *Id.* (citing *Curley v. Cumberland Farms Dairy*, 728 F. Supp. 1123 (D.N.J. 1990).

The permissible scope of review of arbitral decisions is far more limited. Section 10 of the FAA provides extremely limited grounds for vacating an arbitrator's award. Only where (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, or in refusing to hear pertinent evidence, or any other misconduct by which parties' rights have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10. If an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 1015, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001).

South Carolina courts have interpreted this standard narrowly. "Factual and legal errors by arbitrators do not constitute an abuse of their powers . . . . A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." *Pittman Mortgage Co. v. Edwards*, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (1997) (citations omitted). The Fourth Circuit has interpreted the fourth justification in section 10 of the FAA (that the arbitrator exceeded his power) to mean that an arbitrator must act in *manifest disregard of the law* for his decision to be overturned. *See Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231 (4th Cir. 1998).

In light of the narrow standards of review in both cases, we uphold the arbitrator's awards in *Bazzle* and *Lackey*. Green

Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the first three justifications listed in section 10 of the FAA. 9 U.S.C. § 10. That leaves manifest disregard of the law as the only possible justification for overturning the arbitrator's awards. In our opinion, the arbitrator did not act in manifest disregard of the law. As Green Tree noted in its brief, manifest disregard of the law occurs when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case. (App. Br. p. 12) (citing *Trident Technical College v. Lucas Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985), *cert. denied* 474 U.S. 1060, 106 S. Ct. 803, 88 L. Ed. 2d 779, (1986)).

As discussed, the issue of whether class-wide arbitration is permissible when the agreement is silent was not settled in this state at the time of the *Bazzle* and *Lackey* arbitrations. Therefore, the arbitrator did not act in manifest disregard of the law by permitting it to proceed.[23] Accordingly, we uphold the arbitrator's awards.

---

[23] In addition, Green Tree argues that the arbitrator exceeded his powers when he awarded statutory penalties under S.C. Code Ann. § 37-10-102(a). The Bazzle and Lackey plaintiffs argue that the attorney preference statute upon which their allegations are based authorizes class actions filed before May 2, 1997 to proceed. South Carolina Code Ann. § 37-10-102 requires creditors of loans secured by real estate to ascertain the buyer's preference as to legal counsel prior to closing. The creditor complies with this requirement as long as it gives notice to the buyer of the preference information in a manner specified in the statute. Section 37-10-102 does not provide the penalties for violation of this requirement; penalties are provided in section 37-10-105. This section was amended in 1997 and now prohibits class actions. In its amendment, however, the legislature provided specifically that "any actions filed as class actions, without regard to certification, prior to May 2, 1997, may proceed, but with remedies pursuant to section 37-10-105 as amended." 1997 Act No. 99, § 1. As such, the arbitrator did not act in manifest disregard of the law by awarding penalties provided for in the amended section 37-10-105.

III. Due Process Rights of Absent Class Members

Green Tree and the Amici argue that the absent class members' due process rights were violated by the class-wide arbitration of their claims. The *Bazzle* and the *Lackey* plaintiffs, on the other hand, claim the rights of the absent class members were adequately protected through proper notice. Regardless, both classes of plaintiffs argue that this issue is not preserved for review because Green Tree failed to raise it in a timely fashion. We agree that the issue was not preserved for review, and, further, find no evidence that the rights of the class members were not protected in this case.

It is well-settled that an issue may not be raised for the first time on appeal. In order to preserve an issue for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) by the appellant, (3) in a timely manner, and (4) with sufficient specificity. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); Toal, Vafai, & Muckenfuss, *Appellate Practice in South Carolina* at 66 (S.C. Bar 1999).

In *Bazzle*, Green Tree first raised the issue of the absent class members' due process rights in its motion to vacate the arbitrator's final award. Green Tree argued vaguely that "the Arbitrator violated certain due process protections afforded by the Fourteenth Amendment and the South Carolina Constitution." To be preserved, the issue must have been raised and ruled upon by the trial court at the time the class was certified. *I'On, L.L.C. v. Town of Mt. Pleasant*. As Green Tree gave the trial court no opportunity to address this issue, it is procedurally barred. *Id.*

Similarly, in *Lackey*, Green Tree did not raise the due process rights of the absent class members when it moved to decertify the class before the arbitrator. Green Tree raised this

issue for the first time when it argued that the arbitrator's final award should be vacated. Because it did not give the arbitrator an opportunity to rule upon this issue, Green Tree failed to preserve it for review before this Court. *I'On; Wilder.*

Green Tree has not articulated precisely how it believes the class members' due process rights have been violated. In any case, the class members' rights appear to have been properly protected by the notice given to all of them.[24] Green Tree was given the opportunity to review and comment on the notice sent and did not voice an objection to it at that time. Although protection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular attention in class-wide arbitrations, Green Tree has not presented the Court with the means to address it properly.[25]

CONCLUSION

For the foregoing reasons, we AFFIRM the arbitrator's awards in both cases.

MOORE, WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

---

[24] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (holding procedure followed whereby descriptive notice sent to by first-class mail to each class member with explanation of right to opt-out fully satisfied due process).

[25] For a discussion on protection of due process rights, *see Phillips Petroleum v. Shutts*; 42 Wm & Mary L. Rev. 1.

APPENDIX B

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
COURT OF COMMON PLEAS

Civil Action No. 00-CP-18-443
F/K/A C/A NO. 97-CP-18-258

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and for all others similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATIONS a/k/a GREEN TREEN ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

ORDER CONFIRMING AWARD

This matter comes before the Court upon Plaintiffs' Motion to Confirm final Order and Award in Arbitration and Defendants' Motion to Vacate Arbitrator's Award. Present at the hearing were Mary Leigh Arnold, Esquire, Bradford P. Simpson, Esquire and Steven W. Hamm, Esquire, attorneys for Plaintiffs, and Herbert Hamilton, Esquire and Robert Byrd, Esquire, attorneys for Defendants. Having reviewed the motions, memoranda and having heard oral arguments, the Court is of the opinion that the Motion to Confirm should be granted and the Motion to Vacate should be denied.

PROCEDURAL HISTORY

On March 25, 1997, Burt and Lynn Bazzle commenced an action against Green Tree and Patton General Contracting (hereinafter "Patton") in the Court of Common Pleas, Dorchester County, South Carolina (Civil Action No. 97-CP-

18-258), arising out of a home improvement financing agreement. The Complaint includes several causes of action, including unconscionable conduct and violation of the attorney and insurance preference provision of the South Carolina Consumer Protection Code.

On April 21, 1997, the Bazzles filed an Amended Complaint, which incorporated class action allegations. On the same day, the Bazzles filed a Motion for Class Certification. On May 21, 1997, Green Tree filed an Answer to the Amended Complaint and filed a Motion to Compel Arbitration.

On December 5, 1997, the Bazzles' Motion for Class Certification and Green Tree's Motion to Compel Arbitration were heard. The Motion for Class Certification was filed first and heard first by the Court. After the Court granted Plaintiffs' Motion for Class Certification, Green Tree prosecuted its Motion to Compel Arbitration. This Court entered into and filed two (2) separate written Orders memorializing the Rulings of December 5, 1997: (1) an Order Granting Class Certification; and (2) an Order granting Green Tree's Motion to Compel Arbitration.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the Court's Order granting class certification. On February 24, 1998, a hearing was held on Green Tree's Motion for Reconsideration, which was denied by written Order dated March 17, 1998. On or about April 1, 1998, Green Tree filed a Notice of Appeal.

On April 28, 1998, the Court of Appeals entered an Order dismissing the appeal on the grounds that an Order granting class certification is interlocutory and non-appealable. On or about May 7, 1998, Green Tree filed a Petition for Rehearing. On June 12, 1998, the Court of Appeals denied Green Tree's Motion for Reconsideration.

On June 24, 1998, Green Tree filed a Petition for Writ of Certiorari. On February 5, 1999, the South Carolina Supreme

Court dismissed Green Tree's Petition for Writ of Certiorari and remitted the case to the Clerk of Court for Dorchester County.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of Arbitrator. On or about May 6, 1999 Green Tree filed a Motion to Dismiss. On June 2, 1999, the Order Appointing Arbitrator was filed with the Dorchester Clerk of Court. The Order provided that the matter would be referred to the Honorable Thomas J. Ervin, whom had been appointed to Arbitrate the related case of *Lackey v. Green Tree Financial Corporation*, Civil Action No. 96-CP-06-073. The Court declined to hear the Motion to Dismiss due to lack of jurisdiction.

On January 28, 2000, a pre-trial conference was held in *Lackey*. At that time Green Tree requested that all home improvement loans contained in the *Lackey* matter be consolidated with the within action. The Arbitrator granted the request and consolidated all home improvement transactions in *Lackey* with the within action.

On March 23, 2000 a hearing was held before the Arbitrator on Defendant's Motion to Dismiss on the grounds that the Plaintiffs could not proceed with the matter due to their filing for relief under the United States Bankruptcy Code. The Motion to Dismiss was denied. The Arbitrator granted Defendant's request that an Amended Complaint be filed eliminating Patton General Contracting as a defendant and limiting the causes of action to breach of the attorney and insurance preference statute and unconscionability under the South Carolina Consumer Protection Code. The Amended Complaint in Arbitration was served on March 27, 2000.

On July 24, 2000, the Arbitrator executed a written Award providing as follows:

> Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant

precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, reckless, wanton and egregious, and therefore, awarded Plaintiffs the sum of $10,935,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in the amount of $18,252.00, which is one half of $36,504.00. I further conclude that a reasonable attorneys fee of $3,645,500.00 should be awarded to members of the Plaintiffs' class.

On July 25, 2000, Plaintiffs filed a Motion for Confirmation of Award. On or about August 24, 2000, Defendants filed a Motion to Vacate.

SCOPE OF REVIEW

In order to prevail in its motion to vacate and defeat the motion to confirm the arbitration award in this case, Green Tree must bear an extraordinary burden. Section 10 of the Federal Arbitration Act[1] provides extremely limited grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.

[1] This Court previously held that this case was governed by the Federal Arbitration Act. The arbitration clause drafted by Green Tree and incorporated into its consumer credit sale contracts refers only to Section 1 of the FAA, and Plaintiffs maintain that the applicability of the FAA to this case should therefore be limited accordingly. Nevertheless, because the Court has held that this case is governed by the FAA, and because the corresponding provision of the South Carolina Uniform Arbitration Act addressing the standards for vacating an arbitration award is virtually identical to Section 10 of the FAA, Plaintiffs have relied upon the language of Section 10 and the cases construing that section while expressly reserving their argument limiting the applicability of the FAA to Section 1 only.

> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10. Green Tree has alleged no corruption, fraud, partiality or similarly proscribed conduct on the part of the Arbitrator; therefore, the arbitration award may be vacated only upon a showing that the Arbitrator exceeded his power or "imperfectly executed" his duties as described in subsection (4) quoted above. The Fourth Circuit Court of Appeals has interpreted the latter criterion to be limited to cases where the arbitrator demonstrated "manifest disregard of the law." *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (1991).

The courts have been uniform in declaring that judicial review of arbitration awards is extremely limited. The Fourth Circuit recently reiterated the longstanding policies limiting the scope of review available to parties wishing to have arbitral awards vacated:

> Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it.
>
> A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the twin goals of arbitration, namely,

settling disputes efficiently and avoiding long and expensive litigation. Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts.

Remney v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1991) (internal citations and quotation marks omitted). *Accord, Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union*, 973 F.2d 276, 281-82 (4th Cir. 1992). In the *Apex Plumbing* case cited above, the Fourth Circuit stated simply that "the scope of review of an arbitrator's decision is among the narrowest known at law." 142 F.3d at 193. *Accord, Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330, 333 (4th Cir. 1999).

The courts have been clear and consistent in holding that the findings of fact and conclusions of law in an arbitral decision are only subject to being overturned by a court in the narrowest of circumstances. The Fourth Circuit has stated:

> Although we may disagree with an arbitrator's interpretation of a contract, we must uphold it so long as it draws its essence from the agreement. As long as the

> arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment. Consequently, an award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from the collective bargaining agreement.
>
> Not only is an arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable "even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same.

Upshur Coals Corp. v. United Mine Workers, 933 F.2d 225, 229 (4th Cir. 1991) (citations and internal quotation marks omitted).

Our state appellate courts have construed the permissible scope of review of arbitral decisions in an equally narrow manner. In *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998), the South Carolina Court of Appeals stated:

> Our Supreme Court has clearly stated that arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. If an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision. Factual and legal errors by arbitrators do not constitute an abuse of their powers under section 15-48-130(a)(3).

332 S.C. at 243-44, 503 S.E.2d at 785. The Supreme Court, in the decision referenced in *Harris*, held:

> The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have

> attempted to resolve. Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers. A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power.
>
> Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are "barely colorable." If the grounds for the award can be inferred from the facts, the award should be confirmed.

Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (citations omitted).

CONCLUSION

A review of each of the grounds asserted by Defendants as a basis to vacate the Arbitrator's Award reveals that each basis, at best, is merely an assertion that the Arbitrator committed some factual or legal error. Although this Court does not agree that the Arbitrator committed a factual or legal error assuming such were the case, this Court lacks the authority to vacate the award. In addition, this Court notes that it has previously ruled on Green Tree's motion for reconsideration of class certification and there is no basis to address the issue again. NOW THEREFORE, IT IS

ORDERED that Plaintiffs' Motion to Confirm the Arbitration Award be and is hereby granted, and it is

FURTHER ORDERED that Defendant's Motion to Vacate the Arbitration Award be and is hereby denied, and it is

FURTHER ORDERED that the Arbitrator's Award of the sum of $10,935,000.00 statutory damages, plus costs in the

amount of $18,252.00, plus reasonable attorneys' fees in the amount of $3,645,000.00 is confirmed with interest to accrue on the total amount from July 25, 2000, at the legal rate of interest of 8.75%. Interest shall accrue from the filing of this Order at the legal rate of 14% on the total award including statutory penalties, costs, attorneys fees and interim interest earned between July 25, 2000 to the date of the filing of this Order.

AND IT IS SO ORDERED.

/s/ Patrick R. Watts
THE HONORABLE PATRICK R. WATTS
Special Circuit Court Judge

September 15, 2000
Summerville, South Carolina

APPENDIX C

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

[Filed Dec. 19, 2000]

Civil Action No.: 96-CP-06-073

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class
of all others similarly situated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE FINANCIAL SERVICES CORP., a/k/a GREEN TREE ACCEPTANCE CORP., n/k/a CONSECO FINANCE, INC.,
Defendant.

ORDER CONFIRMING FINAL ORDER
AND AWARD IN ARBITRATION AND
DENYING MOTION TO VACATE

This matter comes before the Court upon Plaintiffs' Motion to Confirm Final Order and Award in Arbitration issued on July 24, 2000 and Defendant's Motion to Vacate Arbitrator's Award.

This binding class arbitration Order addresses Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer Protection Code ("Code") in its manufactured home transactions through September 25, 1995.

PROCEDURAL HISTORY

This action was commenced by Plaintiffs against Green Tree in the Court of Common Pleas for Barnwell County, South Carolina (Civil Action No. 96-CP-06-073), by the filing of the Summons and Complaint as a class action on May 28, 1996. (Plaintiffs' Exhibit Notebook 2, Item 47 (hereinafter "Notebook")). On July 30, 1996, Green Tree filed an Answer asserting various defenses. (Notebook 2, Item 56). On October 1, 1996, the Plaintiffs filed a Motion for Class Certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. In response, Green Tree filed a Motion to Stay the Matter and to Compel Arbitration. The Circuit Court denied Green Tree's Motion to Compel arbitration and held that the arbitration clause was unconscionable.

Green Tree appealed the Circuit Court's ruling. The Court of Appeals reversed and remanded the case to the lower court, *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). (Notebook 2, Item 48). On July 23, 1998, the parties entered into a Consent Order signed by Judge Rodney A. Peeples submitting the matter to binding arbitration. (Exhibit A attached). Green Tree reserved no rights under the Consent Order limiting the authority of the Arbitrator.

On August 19, 1998, a hearing was held before the Arbitrator on the issue of whether or not the Plaintiffs' class action could proceed in arbitration. After reviewing the briefs submitted by the Plaintiffs and Green Tree and at the conclusion of oral argument, the Arbitrator determined that a class action should proceed in arbitration based upon his review of the broadly drafted arbitration clause prepared by Green Tree and scheduled a hearing to determine whether the Rule 23 Requirements for class certification were met. The Arbitrator issued his Order Allowing Arbitration of a Class Action on August 28, 1998.

On September 22, 1998, Green Tree initiated a declaratory judgment action in Federal court and filed a Motion for Preliminary Injunction asserting Federal jurisdiction and seeking to prohibit the Arbitrator from certifying a class in arbitration. *Green Tree Financial Corp. v. Lackey, et al.*, Case No. 3:98-2750-17 (D.S.C. 1998). After a hearing, The Honorable Joseph F. Anderson, Jr. denied Green Tree's Motion and dismissed Green Tree's declaratory judgment action for lack of subject matter jurisdiction. (Notebook 2, Item 18).

On November 23, 1998, a hearing on Plaintiffs' Motion for Class Certification was held before the Arbitrator. Green Tree's counsel attended the hearing but declined to participate in the argument of the Motion. Green Tree and its counsel acknowledged that Green Tree had been given adequate notice and an opportunity to be heard. The Arbitrator found that the requirements for class certification were met and that class certification was appropriate, The Arbitrator's Order Certifying Class was issued on December 1, 1998. (Notebook 2, Item 49).

On December 4, 1998, Green Tree filed another declaratory judgment action and petition for injunction in state court in Barnwell County as Civil Action 98-CP-06-278. (Notebook 2, Item 41). Simultaneous with filing the declaratory action in state court, Green Tree also filed its Motion to Stay the arbitration proceedings. On January 6, 1999, The Honorable Gary E. Clary held a hearing on Green Tree's Motion to Stay these arbitration proceedings and denied Green Tree's Motion to Stay.

On August 19, 1999, the parties presented memorandums and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination on the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South

Carolina Code Ann. Section § 37-10-105 as amended by the General Assembly in 1997.

2. Green Tree was the "creditor" for the manufactured housing transactions it funded and was subject to the preference requirements contained in S.C. Code Ann. § 37-10-102(a).

3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.

4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.

5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.

6. Transactions closed outside of the state of South Carolina would not be included in the certified class.

7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

On January 28, 2000, a pre-trial conference was held. At the time of the conference, the parties entered into a Consent Agreement bifurcating the case, and postponing trial for all class members with contracts dated after September 25,1995 for a later arbitration proceeding. (Notebook 2, Item 50).

The trial on this matter was heard by the Arbitrator on March 6, 7 & 8, 2000. At the conclusion of the trial, the Arbitrator issued an oral ruling advising the parties of his decision in this binding arbitration case. On May 31, 2000 a hearing was held at the conclusion of the Bazzle proceeding

in which the Arbitration took testimony and arguments on attorneys fees and set up the procedures for Green Tree to raise offset claims within 30 days or they were waived. On July 24, 2000 the Arbitrator issued his written order which is now the subject of the Motion to Vacate filed by the Defendant and the Motion to Confirm filed by Plaintiffs.

STANDARD OF REVIEW

In order to prevail in its Motion to Vacate the arbitration award in this case, Green Tree must bear an extraordinary burden. Section 10 of the Federal Arbitration Act [1] provides extremely limited grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

[1] The South Carolina Court of Appeals previously held that this case was governed by the Federal Arbitration Act. The arbitration clause drafted by Green Tree and incorporated into its consumer credit sale contracts refers only to Section 1 of the FAA, and Plaintiffs assert that the applicability of the FAA to this case should therefore be limited accordingly. Nevertheless, because the Court of Appeals has held that this case is governed by the FAA, and because the corresponding provision of the South Carolina Uniform Arbitration Act addressing the standards for vacating an arbitration award is virtually identical to Section 10 of the FAA, Plaintiffs have relied upon the language of Section 10 and the cases construing that section while expressly reserving their argument limiting the applicability of the FAA to Section 1 only.

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10. Green Tree has alleged no corruption, fraud, partiality or similarly proscribed conduct on the part of the Arbitrator; therefore, the arbitration award may be vacated only upon a showing that the Arbitrator exceeded his power or "imperfectly executed" his duties as described in subsection (4) quoted above. The Fourth Circuit Court of Appeals has interpreted the latter criterion to be limited to cases where the arbitrator demonstrated "manifest disregard of the law." *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991).

The courts have been uniform in declaring that judicial review of arbitration awards is extremely limited. The Fourth Circuit recently reiterated the longstanding policies limiting the scope of review available to parties wishing to have arbitral awards vacated:

> Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it.
>
> * * *
>
> Thus, in reviewing arbitral awards, a district or appellate court is limited to determining whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts.

Remney v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1991) (internal citations and quotation marks omitted). *Accord, Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142

F.3d 188, 193 (4th Cir. 1998); *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union*, 973 F.2d 276, 281-82 (4th Cir. 1992). In the *Apex Plumbing* case cited above, the Fourth Circuit stated simply that "the scope of review of an arbitrator's decision is among the narrowest known at law." 142 F.3d at 193. *Accord, Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330, 333 (4th Cir. 1999).

The courts have been clear and consistent in holding that the findings of fact and conclusions of law in an arbitral decision are only subject to being overturned by a court in the narrowest of circumstances. The Fourth Circuit has stated:

> Although we may disagree with an arbitrator's interpretation of a contract, we must uphold it so long as it draws its essence from the agreement. As long as the arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment. Consequently, an award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from the [contract].
>
> Not only is an arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable "even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same."

Upshur Coals Corp. v. United Mine Workers, 933 F.2d 225, 229 (4th Cir. 1991) (citations and internal quotation marks omitted).

Our state appellate courts have construed the permissible scope of review of arbitral decisions in an equally narrow manner. In *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998), the South Carolina Court of Appeals stated:

> Our Supreme Court has clearly stated that arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. If an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision. Factual and legal errors by arbitrators do not constitute an abuse of their powers under section 15-48-130(a)(3).

332 S.C. at 243-44, 503 S.E.2d at 785. The Supreme Court, in the decision referenced in *Harris*, held:

> The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have attempted to resolve. Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers. A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power.
>
> Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are "barely colorable." If the grounds for the award can be inferred from the facts, the award should be confirmed.

Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (citations omitted).

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was filed as a class action on May 28, 1996. From the beginning, Green Tree demanded that the case be arbitrated pursuant to the Arbitration clause included in its form contracts with consumers. After the Circuit Court found its arbitration clause to be unconscionable and denied Green Tree's motion to compel arbitration, Green Tree appealed to the South Carolina Court of Appeals. On March 16, 1998 the Court of Appeals reversed this Court and found that while the contracts were contracts of adhesion, that finding did not support a conclusion that the contracts were unconscionable. *Lackey, et al. v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998).

Green Tree raised no issue to the Court of Appeals that the Plaintiffs class action allegations could not be addressed in the arbitration proceeding it consistently demanded. The Court of Appeals noted that the case was brought as a class action suit. Id. at 901. It is noteworthy that the Court of Appeals concluded that the Plaintiffs "failed to demonstrate that they are unable to get the same relief in arbitration which is available in a judicial setting." Id. at 905.

The Court of Appeals remanded this case to this court "for further proceedings." Up to that point, Green Tree had never stated its position that the Arbitrator could not consider the class allegations contained in the complaint filed by the Plaintiffs almost two years earlier. Green Tree did not take any action, including filing a Motion to Strike Class Allegation from the Plaintiffs complaint, prior to consenting to the selection of the Arbitrator on July 23, 1998.

Green Tree now claims that the Arbitrator was without authority to determine or decide whether the matter could proceed as a class action in arbitration. Green Tree has waived this argument. The Consent Order signed on July 23,

1998 reserves no claims or issues for the Court to decide prior to submitting the matter to binding arbitration. The Consent Order is attached as Exhibit "A". Green Tree filed no reservation of rights on any issues, including potential class certification, for a ruling by the Court prior to providing its written consent to be bound by the decision of the Arbitrator selected by both parties. This Court has no authority to consider the issue of class certification which was never raised by Green Tree below prior to the binding arbitration proceeding it repeatedly demanded. Green Tree was afforded exactly the proceeding in binding arbitration that it sought. Green Tree cannot seek to correct its failure to raise this issue after the Court of Appeals issued its Order and prior to Green Tree's written agreement contained in the July 23, 1998 Consent Order giving the Arbitrator jurisdiction to handle all matters, including all pending motions.

A recent case from the Supreme Court of the United States is instructive here, and indeed, it is dispositive of Green Tree's arguments concerning the standard of review applicable to the Arbitrator's decision on the arbitrability of class treatment. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). The Court held that the questions of whether a Court or an Arbitrator hold the primary power to decide arbitrability turns upon the agreement of the parties. If the parties agree to submit the questions of arbitrability itself to arbitration, then the standard of review applicable to the arbitrator's decision on arbitrability is the same as that applicable to the arbitrator's decision on any other issue which the parties agreed to arbitrate. *First Options*, 514 U.S. at 943.

Similarly, the Fourth Circuit has stated:

> It would be odd if having consented to have the arbitrator decide what its legal rights . . . were, [appellee] could then have the same questions redetermined by two courts— the district court and this court. . . Since

> appellee, by submitting without a peep to the arbitrator's jurisdiction, admitted the competence of the arbitrator to determine its "legal rights," it cannot complain that the arbitrator exceeded his authority by determining them.

Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union, 973 F.2d at 280 (citations omitted).

Thus, in this case, in which the parties willingly submitted to arbitration the questions of whether the Arbitrator could adjudicate a class action, the Arbitrator's decision is not subject to review except to the extent that Green Tree can present grounds for vacatur. Green Tree is simply unable to make the showing required to justify this extraordinary relief.

A review of the record in arbitration reflects that Green Tree did not argue to the Arbitrator that only a Court could consider whether or not the case could proceed as a class action in arbitration. Green Tree argued to the Arbitrator that its arbitration clause did not permit or authorize class actions and urged the Arbitrator to rule that the arbitration clause would not permit the case to proceed as a class action. The Arbitrator, after considering all the arguments and materials submitted by the parties, ruled against Green Tree's position. Only after the Arbitrator decided that the arbitration clause permitted class arbitration and that class treatment was appropriate in this case did Green Tree object. Green Tree's failure to argue to the Arbitrator that only a Court could grant class certifiction cannot now be cured by seeking to vacate the Arbitrator's Order.

The Courts have recognized that parties can manifest their agreement to arbitrate issues by their conduct. *Rock-Tenn Company v. United Paperworkers International Union*, 184 F.3d 330 (4th Cir. 1999). Plaintiffs argue that Green Tree's failure to reserve an argument with the Circuit Court that the Arbitrator could not decide class arbitration prior to

submitting the entire case to the Arbitrator is a waiver of any claimed right to later challenge the Arbitrator's authority in court. The Court agrees.

Numerous cases exist where courts certified a class of plaintiffs who proceeded in arbitration as class action. See *Keating v. Superior Court*, 31 Cal.2d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1989); *Izzi v. Mesquite Country Club*, 186 Cal. App. 2d 1309, 231 Cal. Rptr. 315 (1986); *Lewis v. Prudential Bache Securities*, 179 Cal. App. 3d 935, 945-46, 225 Cal. Rptr. 69 (Cal. App. 4 Dist. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 294, 596 A.2d 860 (1991); *Boyton v. Barnett*, 238 Ga. 417, 233 S.E.2d 185 (1977); and *Callaway v. Carswell*, 240 Ga. 579, 252 S.E.2d 103 (1978). See also *Nicholson v. CPC Intern., Inc.*, 877 F.2d 227 (3rd Cir. 1989) (dissent noting "arbitrations may go forward as class actions"). In addition to advancing as a class action, it is also an acceptable practice in arbitration to consolidate matters. Consolidations avoid duplicative litigation in the arbitration forum just as in court procedures. *Episcopal Housing Corp. v. Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451(1979); *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 403, 365 S.E.2d 231 (1988); see *New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988); and *Maxum Foundations, Inc. v. Salus Corporation*, 817 F.2d 1086 (1987).

The Arbitrator received this case from the Circuit Court with a pending Motion to Certify a Class which was filed on October 1, 1996. Having failed to take any action to strike the class allegations contained in the complaint or the Motion to Certify prior to submitting the entire matter to the jurisdiction of the Arbitrator, Green Tree cannot now argue against the decision of the Arbitrator. Having presented its argument to the Arbitrator that its arbitration clause prevented class arbitration, it is clear that Green Tree consented to having the Arbitrator decide this issue. Green Tree's complaint that the

Arbitrator exceeded his authority is remarkable in light of Green Tree's failure to take any action or reserve any right to address the Arbitrator's authority prior to proceeding into binding arbitration. The Arbitrator took the case as presented to him, considered the entire contract and the law and issued his ruling. Green Tree presented its argument on class certification in binding arbitration and lost. The Court has limited authority to disturb an Arbitration Order and declines to interfere with the very arbitration proceeding that Green Tree demanded as the process to resolve the class action lawsuit filed by the Plaintiffs over four years ago.

In *Rock-Tenn Co.*, supra, the Fourth Circuit held that "even when a party could have refused arbitration in the first instance, and even when the issue resolved by the arbitrator is one 'of law,' if that party 'voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it.'" *Rock-Tenn Co.*, 184 F.3d at 334-35. The Court distinguished the *Rock-Tenn* case from *A. T. Massey Coal, Co. v. United Mine Workers*, 799 F.2d 142 (4th Cir. 1986). A. T. Massey had successfully challenged arbitrability of a particular issue in Court *prior to the case being referred to arbitration.* The Fourth Circuit held that Rock-Tenn could not challenge the arbitrator's ruling in that case because the Company could have done so prior to the case being sent to arbitration but elected to allow the arbitrator to decide the issue. Similarly, Green Tree could have asked the Circuit Court to strike the Plaintiffs' class allegations prior to the entry of the Consent Order referring the case to the arbitrator. Instead, Green Tree elected to have the arbitrator determine the legal question of whether class treatment was within the scope of arbitrability. Green Tree cannot now be heard to complain that the arbitrator exceeded his powers after it had previously consented to allowing the arbitrator to decide the issue.

Arbitration is a contractual right. Federal courts look to state law for contract interpretation. "Every contract entered into in this state embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated. *Inabinet v. Royal Exchange Assoc. of London*, 162 S.E. 599 (S.C. 1932).

The Court notes that the arbitration clause drafted by Green Tree authorizes the Arbitrator to have "all powers provided by the law and the contract." In addition, the arbitration clause covers ". . . all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes, will be subject to binding arbitration in accord with this contract." Id. Green Tree argues that the Arbitrator powers "were limited by the parties arbitration agreement." Memorandum of Green Tree in Support of Motion to Vacate Arbitrator's Award; p.2. This "all powers" language provided by the clause is in addition to the contract rights and remedies and includes the right to determine class arbitration.

Green Tree ignores the law that applies to this case. In 1997, the South Carolina General Assembly adopted a new law revising the attorney preference statute at issue during arbitration of this case. Section 5 of Act 99 of 1997 expressly stated that any actions filed as class actions on or before of May 2, 1997 "may proceed."[2] Green Tree seeks to choose which "law" its arbitration clause references with regard to

---

[2] Section 5 of Act 99 of 1997 (H.3272, R.217) reads as follows:

"SECTION 5. This act takes effect upon approval by the Governor and applies to causes of action, including appeals, pending on May 2, 1997. Any actions filed as class actions, without regard to certification, filed on or before May 2, 1997, may proceed, but with remedies pursuant to Section 37-10-105 as amended in Section 1 of this act. The three-year statute of limitations provided herein applies to all actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any existing action."

the powers given to the Arbitrator. The General Assembly provided direct statutory authority and law to the Arbitrator as he considered the powers afforded to him under Green Tree's contract. Since the 1997 legislative amendment authorized the instant case to proceed as a class action, Green Tree cannot now claim that its arbitration clause was silent on the issue of class arbitration in light of its own language referencing all powers provided by the law and statutory law and all other laws. The Arbitrator applied the law when he concluded that the case could proceed as a class action in arbitration. The Court of Appeals stated that Plaintiffs lost no rights by being forced into arbitration. *Lackey v. Green Tree*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). Id. at 400-01. The Arbitrator, applying the law that existed at the time, determined that a class action could proceed in arbitration, considered and applied the law referenced in Green Tree's own arbitration clause. This Court concludes that the Arbitrator acted within the express authority granted by the arbitration clause drafted by Green Tree. None of the cases cited by Green Tree involve a specific state law authorizing a class action to proceed as a matter of law.

South Carolina case law would not be applicable only if preempted by the FAA. But, state law is only preempted to the extent it stands as an obstacle to arbitration. *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The FAA places arbitration agreements on an equal footing with contracts generally. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-271, 130 L.Ed.2d 753, 115 S.Ct. 834 (1995) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

The court in *Blue Cross of California, et al. v. Elizabeth Farquar, et al.*, 67 Cal.App. 4th 42, 1998 Cal.App. Lexis 845, 79 Cal. Rptr.2d 779 (1998), addressed the issue of class-wide arbitration in which a case falls under the FAA. The first question was whether the FAA preempted state law on this

question, and the court found that it did not. The court in *Blue Cross* then analogized the consolidation of arbitration as support for ordering class arbitration. Consolidation was authorized by statute in California.

In the context of a dispute governed by the FAA, the South Carolina Supreme Court allowed the *consolidation* of arbitration proceedings even though the contract language did not explicitly provide for consolidation. *Episcopal Housing Corp. v. Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979). South Carolina also authorizes the consolidation (joinder) of arbitration proceedings under § 15-48-60.

Green Tree relies on *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) and argues that arbitration and class certification are mutually exclusive in the absence of a specific provision allowing class treatment. It is questionable whether the Fourth Circuit would follow *Champ*. *Champ* is distinguishable. Unlike South Carolina law, Illinois law did not allow class arbitration. In *Champ*, the motion to compel was granted and the district court never ruled on the motion to certify the class. Thereafter, the plaintiff in *Champ* filed a motion requesting that the court certify her as the class representative in the arbitration. The court should not have even exercised jurisdiction over the matter once it ordered arbitration although this appears not to have been addressed on appeal. See Order of Judge Joseph F. Anderson, Jr., denying Green Tree's Motion to enjoin the class arbitration in this case. (Notebook 5, Item 12).

The contract itself states that all disputes, claims or controversies relating to the contract or the validity of the arbitration clause or the entire contract shall be resolved by binding arbitration by the Arbitrator. Here, Green Tree drafted its own arbitration clause making clear that the parties agreed to arbitrate arbitrability and the decision by the Arbitrator that the clause afforded him appropriate authority to arbitrate this matter as a class action is binding on Green Tree.

Green Tree willingly submitted the issue of class arbitration to the Arbitrator in light of its failure to raise the issue prior to arbitration. Green Tree sought to have the Arbitrator issue a decision against class certification in arbitration and failing in that effort, now seeks to change its position by arguing the Arbitrator had no authority. Green Tree cannot now argue both positions in an effort to vacate the decision issued in this binding arbitration.

Green Tree further asserts that the arbitrator failed to properly apply the law with regard to S.C. Code of Law Sections 37-5-202, 37-10-105 and 37-2-404. In addition, Green Tree asserts that the Arbitrator failed to properly apply the pertinent law to the content of the class Notice and failed to properly review the appropriate law relating to the recovery of attorney's fees. This Circuit has repeatedly held that, "as a matter of law neither misinterpretation of a contract nor an error of law constitutes a ground on which an award can be vacated. Indeed, a conclusion reached by the [arbitrator], even if questionable . . . does not constitute exceeding [his] power." *Apex Plumbing*, 142 F.3d at 193-94. The Court again notes that a legal interpretation of an arbitrator is accorded great deference. *Upshur Coals Corporation v. United Mine Workers of America*, 933 F.2d 225 (4th Cir. 1991). The statutory grounds to vacate an arbitration award do not permit rejection of an award based upon a parties disagreement with a particular result. Green Tree now seeks to transform the arbitration proceeding it demanded into a purely advisory exercise. This Court will not permit such a result and has no authority to do so. As the Fourth Circuit noted in 1993,

> [o]pening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, Courts have resisted temptations to redo arbitral

> decisions. As the Seventh Circuit put it, "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."
>
> *Remmey v. Paine Webber, Inc.*, 32 F.3rd 143 (4th Cir. 1994) quoting *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993).

Finally, Green Tree contests the methodology and results of the Arbitrator's analysis of the question of attorney's fees. The Court first notes that the Arbitrator's decision regarding attorney's fees are due the same degree of deference as are his decisions on other matters. The Court further notes upon review of the record that the Arbitrator considered each of the six factors prescribed under South Carolina law as prerequisites to an award of fees. The Court also has considered the rule that where a fee award by a trial court is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989). Because an arbitral award is even more difficult to overturn than a trial court's decision under such conditions, it is inconceivable that the Arbitrator's award of attorney's fees here could be subject to vacatur. The Court therefore declines to vacate the arbitral award of attorney's fees.

The Final Order and Award in Arbitration in this reflects a detailed and careful review of all matters presented to the Arbitrator. This Court would not be free to vacate this award even if it would have reached a different conclusion. It is clear that the decision reached by the Arbitrator, a former Circuit Court Judge with many years of judicial experience, represents a considered and careful review of all matters, and this Court declines to intervene as requested by Green Tree.

The Court has carefully reviewed and considered all arguments presented by the parties in this matter. Any matters presented by the parties which have not been specifically discussed in this Order have been considered and rejected.

For the aforementioned reasons I confirm the Arbitrator's award of $9,200,000 in statutory damages, $18,252.00 in costs, and $3,066,666.00 in attorneys fees;

NOW THEREFORE this Court having reviewed the Defendants' Motion to Vacate the Arbitrator's Award and having heard oral arguments and for the reasons stated above, IT IS

ORDERED that Plaintiffs' Motion for Confirmation of the Arbitrator's Award filed on July 25, 2000, be and is hereby granted, and it is

FURTHER ORDERED that Defendants' Motion to Vacate the Arbitrator be and is hereby denied, and it is

IT IS THEREFORE ORDERED that the Clerk of Court for Barnwell County, South Carolina enter a judgment for $12,284,918.00 plus the interest which has accrued at the rate of 8.75%, from the filing of this award on July 25, 2000 until the entry of this judgment, against the Defendant, Green Tree Financial Corporation, a/k/a Green Tree Financial Services Corporation, a/k/a Green Tree Acceptance Corporation, n/k/a Conseco Finance, Inc.

Upon entry of this judgment by the Clerk of Court this judgment will accrue interest at the legal rate of 14% per annum until it is satisfied of record.

IT IS SO ORDERED.

/s/ Rodney A. Peeples
RODNEY A. PEEPLES
Chief Administrative Judge
Second Judicial Circuit

December 19, 2000

APPENDIX D

IN ARBITRATION
STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
COURT OF COMMON PLEAS

[Filed Jul. 25, 2000]

Civil Action No. 97-CP-18-258

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and
for all others similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a Green TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

FINAL ORDER AND AWARD IN ARBITRATION

This binding class arbitration deals with Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer Protection Code ("Code") in its home improvement transactions through April 21, 1997.[1]

---

[1] This class action previously consisted of all home improvement retail installment transactions secured by real estate located in South Carolina entered into three years prior to April 21, 1997. At the request of Green Tree and with the consent of Plaintiffs, a portion of the class in the related

A. PROCEDURAL HISTORY

On March 25, 1997, Burt and Lynn Bazzle commenced an action against Green Tree and Patton General Contracting (hereinafter "Patton") in the Court of Common Pleas, Dorchester County, South Carolina (Civil Action No. 97-CP-18-258), arising out of a home improvement financing agreement. (Notebook 4, Item 5)[2]. The Complaint includes causes of action for unconscionable conduct and violation of the attorney and insurance preference provision of the South Carolina Consumer Protection Code.

On April 21, 1997, the Bazzles filed an Amended Complaint, which incorporated class action allegations. (Notebook 4, Item 5). On the same day, the Bazzles filed a Motion for Class Certification. (Notebook 4, Item 3). On May 21, 1997, Green Tree filed an Answer to the Amended Complaint (Notebook 4, Item 7) and filed a Motion to Compel Arbitration. (Notebook 4, Item 9).

On December 5, 1997, The Honorable Patrick R. Watts, Master-In-Equity, sitting as Special Circuit Court Judge, heard and ruled on the Bazzles' Motion for Class Certification and Green Tree's Motion to Compel Arbitration. The Motion for Class Certification was filed first, and therefore, heard first. After the Court heard and granted Plaintiffs' Motion for Class Certification, Green Tree pursued its Motion to Compel Arbitration. At Green Tree's own

---

case of *Lackey et. al. v. Green Tree Financial Corporation et. al.*, (Civil Action 96-CP-06-073) (hereinafter "*Lackey*"), involving, in part, home improvement transactions secured by real estate located in the State of South Carolina and entered into three years prior to May 28, 1996, were joined and tried with this action. (Notebook 2, Item 50). Thus, this action consists of all home improvement transactions secured by real estate located in the State of South Carolina with payments made between May 28, 1993 and April 21, 1997.

[2] References to Notebook and Items are to Arbitration Hearing Exhibits.

insistence, its Motion to Compel Arbitration was granted after the Class was certified.

Judge Watts entered into and filed two (2) separate written Orders memorializing his Rulings of December 5, 1997: (1) an Order Granting Class Certification (Notebook 4, Item 16); and (2) an Order granting Green Tree's Motion to Compel Arbitration. (Notebook 4, Item 17). The Order Granting Class Certification directed Green Tree to provide the Plaintiffs with the names and addresses of each class member within sixty (60) days and further directed the Plaintiffs' counsel, to as soon as possible thereafter, and no later than one hundred and twenty (120) days from the date of the Order to provide actual notice to the class members. On January 7, 1998, Judge Watts executed a Supplemental Order to the Order Granting Class Certification to correct a scrivener's error. (Notebook 4, Item 19).

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the Court's Order granting class certification. (Notebook 4, Item 20). On February 24, 1998, a hearing was held on Green Tree's Motion for Reconsideration. On March 17, 1998, The Honorable Patrick R. Watts, denied Green Tree's Motion for Reconsideration. On or about April 1, 1998, Green Tree filed a Notice of Appeal. (Notebook 4, Item 23).

Shortly after receiving Green Tree's Notice of Appeal, the Clerk of the Court of Appeals wrote to counsel of record inquiring as to the appropriateness of the appeal. The Bazzles responded to the inquiry by filing a Motion to Dismiss on the grounds that the appeal was interlocutory. (Notebook 4, Item 24).

On April 28, 1998, the Court of Appeals entered an Order dismissing the appeal on the grounds that an Order granting class certification is interlocutory and non-appealable. (Notebook 4, Item 26). On or about May 7, 1998, Green Tree filed

a Petition for Rehearing. (Notebook 4, Item 28). On June 12, 1998, the Court of Appeals denied Green Tree's Motion for Reconsideration. (Notebook 4, Item 29).

On June 24, 1998, Green Tree filed a Petition for Writ of Certiorari. On February 9, 1999, the South Carolina Supreme Court dismissed Green Tree's Petition for Writ of Certiorari and remitted the case to the Clerk of Court for Dorchester County.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of Arbitrator. (Notebook 4, Item 52). On or about May 6, 1999 Green Tree filed a Motion to Dismiss. (Notebook 4, Item 42). The grounds for the Motion to Dismiss were the filing of foreclosure proceedings against the Bazzles by their first mortgage holder and the filing for relief by the Bazzles under Chapter 13 of the United States Bankruptcy Code. On May 20, 1999, the Plaintiffs filed opposition to the Motion to Dismiss. (Notebook 4, Item 41).

On May 20, 1999, a hearing was held before The Honorable Patrick R. Watts, for the purposes of hearing the Bazzles' Motion to Compel the Appointment of an Arbitrator and Green Tree's Motion to Dismiss. At the time of the hearing Judge Watts directed that this Arbitrator be appointed due to a previous agreement reached between the parties. Judge Watts declined to hear the Motion to Dismiss on the ground he lacked jurisdiction. On June 2, 1999, the Order Appointing Arbitrator was filed with the Dorchester Clerk of Court. (Notebook 4, Item 50).

On or about March 16, 2000, Green Tree resubmitted its Motion to Dismiss to this Arbitration due to the Bazzles filing for bankruptcy. On March 23, 2000, a hearing was held at which time the Motion to Dismiss was denied. Green Tree also argued at the time of the hearing that the causes of action should be limited to those relating to violations of the South Carolina Protection Code and that Patton should be removed

as a Defendant. At Green Tree's insistence, a Bifurcated Second Amended Complaint in Arbitration against Green Tree alone, including class action allegations, was served on March 27, 2000. (Notebook 2, Item 36).

The Second Amended Complaint set forth two causes of action: (1) violation of the South Carolina attorney/insurance preference statute, §37-10-102 *et. seq.*; and (2) unconscionable conduct in violation of §37-10-105. On April 11, 2000, Green Tree filed its Answer. (Notebook 2, Item 46). In the Answer Green Tree made several admissions. These admissions are as follows: (1) In paragraph 5 Green Tree admits that the Bazzles were solicited by an agent of Green Tree; (2) In paragraph 9 Green Tree admits that it prepared certain of the documents for the transaction; (3) In paragraph 11 Green Tree admits that it comes within the definition of a creditor under the South Carolina Consumer Protection Code; (4) In paragraph 12 Green Tree admits the transactions are consumer credit transactions as defined in the Consumer Credit Code; and (5) In paragraph 14 Green Tree admits to having knowledge of the filing of the Broomfield Complaint.

B. RULINGS IN RELATED MATTERS BINDING THIS CASE

On August 19, 1999, in conjunction with the *Lackey* case, the parties to this arbitration presented memoranda and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination of the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South Carolina Code Ann. §37-10-105 as amended by the General Assembly in 1997.
2. Green Tree was the "creditor" for the transactions it funded and was subject to the preference requirements contained in S.C. Code Ann §37-10-102(a).

3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.
4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.
5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.
6. Transactions closed outside of the State of South Carolina would not be included in the certified class.
7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

These specific rulings apply to this matter and are binding in this matter as well as in the *Lackey* case.

C. THE RECORD

All exhibits presented by the parties at the hearing held on May 31, 2000, consisting of six separate notebooks were made a part of the record. (See List attached hereto as Exhibit "A"). In addition, all documents, exhibits and witness testimony presented at the hearing held on March 6, 2000 through March 9, 2000 in the *Lackey* case, including the entire trial transcript, were made a part of this record at the specific request of the parties. At the time of the hearing, Green Tree acknowledged there was a Green Tree credit application in the Bazzles' file, wherein Green Tree was directed to provide and include the same as part of the record. The joint Petition for Attorneys Fees relating to the *Lackey* case and this case and supporting Affidavit were made a part of the record, in addition to John P. Freeman, Esquire's live testimony that took place after the award was rendered in this matter.

Finally, the transcript of the hearing in this matter, including all issues addressed subsequent to the close of the hearing is made a part of this record.

D. FINDINGS OF FACT

1. *The Transactions*

The Plaintiffs and all others similarly situated in this case entered into standard form consumer Retail Installment Contracts and Security Agreements (hereinafter "HI-RIC") with Green Tree secured by real property that are subject to the South Carolina Consumer Protection Code. (Notebook 1, Items 9 & 10). The HI-RIC is identified by the alphanumeric Code GT-15-41-010 (11/92). The contracts and agreements entered into by the Plaintiffs and Green Tree were prepared by Green Tree and obligated each consumer to make monthly payments. The HI-RIC makes specific reference to two provisions of the South Carolina Consumer Protection Code. Furthermore, the HI-RIC unequivocally requires the consumer to acquire insurance on the secured realty and list the creditor as a lost payee.

In each of the transactions, the consumer completed a Green Tree application with the assistance of a Green Tree dealer. Green Tree's dealer then submitted the application to Green Tree for approval. (*Id.*). The Green Tree application form contained no attorney preference and insurance preference notice. No separate attorney preference form was provided to the consumer at the time of credit application. Green Tree verified the consumer's employment and income and determined the creditworthiness of the consumer. (*Id*). Green Tree would then notify its dealer if credit was granted. If credit was not approved, Green Tree would notify the consumer directly in writing of the denial of credit. (Notebook 2, Item 23).

The record shows that Green Tree was the "creditor" from the beginning of the transaction. Green Tree was the creditor

before any assignment and before it could claim the status of assignee. If credit was granted, Green Tree alone set the terms of the credit. Green Tree determined the rate of interest. Green Tree determined if the consumer was required to meet any special conditions. Green Tree obtained an appraisal on the real property. Green Tree obtained a title search. Green Tree prepared the HI-RIC. Green Tree prepared the mortgage identified by alphanumeric designation GT-15-41-050 (8/90). Green Tree prepared the HUD-1 Statement which identified Green Tree as the creditor. Green Tree specified on the face of the mortgage that it was to be returned to Green Tree. Green Tree prepared the Right of Recission which identified Green Tree as the creditor. Green Tree forwarded the prepared documents to its dealer. The dealer would then secure the signatures of the consumers. Simultaneously with the closing, the note and mortgage were assigned to Green Tree. Typically, no attorney was present at the time of closing. (Notebook 2, Items 11 & 23). No attorney was involved in the transaction. Green Tree funded the transaction after the consumer had reported satisfaction with the work. Green Tree would then issue checks to its dealers.

2. *Green Tree's Actual Notice of the Attorney and Insurance Agent Preference Statute and Continued Non-Compliance*

This action is not the first time Green Tree has been sued in South Carolina for noncompliance with the preference statute. Prior to the filing of this class action in 1997, Green Tree was involved in several cases involving allegations of a violation of the preference statute with one being of particular interest, *Broomfield v. Green Tree Financial Corp.* (Civil Action No. 94-CP-08-1786).

On December 4, 1994, Robert and Christine Broomfield filed an amended complaint against Green Tree and its agent seeking recovery under a $15,000.00 note and mortgage, including a cause of action for violation of the attorney

preference statute §37-10-102. (Notebook 1, Item 1). At no time during the course of the Broomfield case did Green Tree deny that it failed to adhere to the attorney and insurance agent preference statute. In late November 1996, the case was settled immediately before it was called for trial. Green Tree agreed to pay the [sic] Mr. and Mrs. Broomfield $50,000.00 and further agreed to satisfy the note and mortgage discharging them from any further obligation to Green Tree. Throughout the course of discovery in the *Broomfield* case, Green Tree repeatedly admitted that it did not comply with the attorney and insurance agent preference statute.

In the *Broomfield* case, Donald McConnell, Green Tree's in house counsel, was designated by Green Tree's [sic] as its Rule 30(b)(6) witness. On September 18, 1996, Mr. McConnell's deposition was taken. Mr. McConnell unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent. Mr. McConnell was completely unaware of the attorney preference requirement and only learned of it through the pending lawsuit[3]. (Notebook 2, Item 17).

Prior to Mr. McConnell's deposition, Keith Troup, a South Carolina manager for Green Tree's Home Improvement Division was deposed by counsel for the Broomfields. Mr. Troup also testified that Green Tree did not have an attorney prepare the mortgage, note, or any other document involved in a real estate secured transaction in the State of South Carolina and that at no time was a consumer provided with notice of the borrower's right to select counsel or an insurance agent. (Notebook 2, Item 23).

The *Broomfield* case clearly establishes that in late 1994 Green Tree had actual notice of the attorney preference

[3] Arbitrator declines to rule on the issue of unauthorized practice of law. Plaintiffs' reserved the right to raise this issue in the original jurisdiction of the South Carolina Supreme Court if any appeal is filed.

statute. Furthermore, it corroborates in this case Green Tree's subsequent wilful non-compliance with the attorney and insurance agent preference statute.

In addition to the *Broomfield* case being instructive, the deposition testimony of Ira Usry, Green Tree's Manufactured Housing Division employee is instructive with regard to Green Tree's cavalier attitude about compliance and its failure to comply with the preference statute. Mr. Usry testified:

On page 15, line 8:

Question: When Green Tree decided to go into that part of the business in South Carolina, were you involved in any way in determining what was necessary to do that properly in terms of the laws of South Carolina and the forms necessary?

Answer: That would be provided by corporate legal and the a.. it area in Saint Paul.

Then on page 19, line 3:

Question: Did you have contact, you personally or anyone at Green Tree from Saint Paul, for that matter, have contact from time to time with any state agencies of South Carolina?

Answer: No.

Then on page 21, line 17:

Question: Do you recall when you personally learned about the . . . learned that there may be some requirement concerning notice to consumers of the right to choose an attorney or the provider of any required insurance of South Carolina?

Answer: I cannot give you the date or the time or the year. I remember that I had someone mention to me that this is something we need to check into. We did so and tried to make the changes from there.

Then on page 22, line 8:

Question: This memo, Exhibit two, is dated September 20, 1995. As far as you know, prior to that time, had anyone at Green Tree made any efforts to inquire into what we referred to?

Answer: I don't think we had knowledge of it.

Then on page 23, line 14:

Question: Before this memo was sent out on September of 1995, you probably already answered this question because you said you didn't have any knowledge of it, but any attorneys that had been involved in any way in any transactions prior to that time, had any of them advised anyone at Green Tree, to your knowledge, that there was any problem with the credit application form or if they had to have an attorney preference notice in the application?

Answer: Never did and at that point we wondered why nobody ever said anything.

Then on page 28, line 7:

Question: How did you learn about the attorney preference requirement?

Answer: I believe we had an employee who carne in one day and said there's a document that we don't have that we need possibly to look into.

Question: Was it that conversation with that employee that led you eventually to issue this memorandum on September 25th?

Answer: I would imagine so, yes.

Question: Did you conduct any investigation after that conversation?

Answer: I think what we did after that conversation, frankly, was call someone and said, tell us about this document and from then on, we contacted probably by memo or by phone or whatever the corporate office and said, we thought we might need to do something here.

Then on page 30, line 13:

Question: Who would you have contacted at corporate?

Answer: I couldn't tell you. We were assigned specific lawyers from time to time. They were inaccessible. So, you would go for anyone. It could have been voice mail.

Question: You were assigned specific lawyers at corporate?

Answer: Yes.

Question: Were these South Carolina lawyers?

Answer: No.

Then on page 32, line 11:

Question: Right. You felt it was something that needed to be done?

Answer: Yes.

Then on page 38, line 2

Question: But they weren't in the practices [sic] of sending you regular updates on South Carolina law?

Answer: No.

Question: Was that their function?

Answer: Their function was to assist us on all legal issues and typically any legal issues in South Carolina for a few lawsuits.

And finally, on page 67, line 1:

Question: To your knowledge, did Green Tree . . . well, I had asked that. Other than your memorandum, did you ever receive any communication from Green Tree?

Answer: Well, no.

Question: Did you ever receive any communication from Green Tree regarding the attorney preference requirement before September 25, 1995?

Answer: Not that I recall.

Green Tree refused to admit that it failed to comply with the attorney and insurance agent preference statute through the date of the filing of the within action; however, it failed to provide any evidence or testimony of compliance.[4] Green Tree offered no forms of compliance. Green Tree offered no memorandum of attempted compliance. Green Tree offered no evidence of any nature that after it was sued by the Broomfields in 1994 that it attempted to comply with the preference statute within its Home Improvement Division. In fact, the Home Improvement Division's Dealers Policies and Procedures Manual, which Green Tree refers to as its "bible," and which was made part of the record here, is void of any instruction or policy to comply with the statute or provide the required disclosure. Furthermore, after Green Tree had undisputed actual knowledge of the statute, it failed to modify, correct or supplement its "bible" to incorporate any compliance procedures or take any other actions reasonably adapted to ensure compliance with the preference statute.

---

[4] Green Tree did admit in the *Lackey* case that it did not comply with the attorney and insurance agent preference statute: It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to 1995, the attorney and insurance agent preference requirement as impounded in *Tilley*, was not complied with. Memoranda of Green Tree Financial Corporation dated June 25, 1999, p.3.

After learning of the preference statute, Green Tree did nothing. It failed to provide the notice. It failed to use attorneys for the transactions. After five suits, including this one, having been brought against Green Tree for failing to comply with the preference statute, it still continued to refuse to take any action or to adhere to the statute's requirements. In fact, Plaintiffs presented the affidavit of Kristen Learnard, whom stated under oath that she was not given the preference notice or form with regard to a closing, that took place seven months after this action was filed. Thus, based on the testimony and the evidence of record, I find that Green Tree simply chose to totally ignore the law despite learning of the requirement. As a result of its behavior, Green Tree's conduct rises to a shocking level of callous and reckless indifference to the rights of South Carolina residents.

3. *Class Members*

At the time of the hearing, Green Tree was instructed to produce a list of all class members and the date that each transaction was entered. (See Attachment B, incorporated herein by specific reference). The list reveals a total of 1,911 class members. Of the 1,911, twelve (12) elected to opt out of the class. (Notebook 4, Item 57; Transcript of May 31, 2000 Hearing, Exhibit 2) Of the remaining 1,899 class members, 1,323 of the transactions were entered into prior to September 25, 1995, and 576 were entered into on or after September 25, 1995. Green Tree was given thirty (30) days to provide a list of any additional members which should be taken out of the class and the factual basis for its position. Green Tree has not provided such a list or basis; therefore, it has waived any right to do so, resulting in the total number of class members in this matter of 1,899.

E. CONCLUSIONS OF LAW

1. *Violations of and Liability under the Attorney Preference Statute.*

Based upon the ruling of the South Carolina Supreme Court in *Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d 16 (1998) and the facts shown on the record in this case, Plaintiffs are entitled, as a matter of law, to a decision that Green Tree is liable for violating S.C. Code Ann. § 37-10-102(a).

As a major corporation doing business in South Carolina for an extended period of time, Green Tree, based on its continuing non-compliance with the preference statute, has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement. Despite Green Tree's vast financial resources, it took no affirmative action to educate itself on the requirements of South Carolina's attorney preference statute. Green Tree's former chief counsel, Mr. Evans, testified that he was responsible for Green Tree's legal compliance. Mr. Evans testified that he was "not aware of the attorney and insurance agent preference statute prior to 1995."

All the testimony and evidence presented at the arbitration hearing clearly shows an ongoing pattern and practice of a disregard for the applicable South Carolina law. The pattern and practice began as a careless or negligent attitude and graduated into wilful non-compliance and a disregard for South Carolina law. While Plaintiffs as a class did not attempt to show actual damages, certainly the plaintiffs suffered injury and loss of their state law right to be advised of their attorney and insurance agent preference. Plaintiffs were denied any knowledge of this important provision of South Carolina law, which the Legislature chose to enact and reenact for many years. I find that Plaintiffs in this class were harmed even to the extent that it is difficult to put a dollar figure on their injury. One of the factors that the Arbitrator must pursue and examine is the attitude and conduct of the

defendant in determining the appropriate penalty in the range provided by S.C. Code Ann. §37-10-105. With regard to an appropriate penalty, the arbitrator should look at the totality of the circumstances. That decision can not be made in a vacuum. The case law says that the requirements of a penal statute must be applied in a manner which results in fairness and justice to the parties. The record reflects that the consumer lending industry is becoming more and more significant in South Carolina. As a matter of public policy, the General Assembly intended to protect consumers in secured transactions of this nature when it placed the preference statute in the South Carolina Consumer Protection Code. The record in this case reflects that Green Tree did have corporate legal counsel and yet no reasonable or direct efforts were taken by Green Tree or his staff to:

(1) Learn of the South Carolina attorney and insurance preference statutory provision; and

(2) More importantly, once it came to Green Tree's attention, to take some affirmative action to bring Green Tree into compliance with the provisions of the statute.

The real question becomes: What did Green Tree do once it was on notice of the preference statute? The answer to that question is one of the most disturbing and shocking aspect [sic] of this case. Green Tree did nothing. Green Tree did nothing after repeatedly being directly made aware of the statute.

Contrary to the position of Green Tree, this case is far worse than the related case of *Lackey*. Green Tree's Home Improvement Division learned of the preference statute by virtue of the Broomfield suit filed in 1994. It is shocking to learn that Green Tree, one of the leaders in the industry, after being sued and having to pay substantial damages, made no effort to comply. Green Tree's Home Improvement Division at no time issued a policy statement. Green Tree did nothing

to educate its employees or dealers. Green Tree's Home Improvement Division merely went about its business, unlike the Manufactured Housing Division, which at least issued a memo about compliance to some of its personnel.

After hearing all the testimony and reviewing all the evidence and considering all the relevant factors in accessing an appropriate penalty, I find and conclude as a matter of law that Green Tree's behavior up to September 25, 1995 was careless and reckless and that the appropriate penalty in this case, as in the *Lackey* case, is $5,000.00 per transaction for transactions occurring prior to September 25, 1995. Based upon Green Tree's shocking course of wilful non-compliance and the fact that it blatantly chose to virtually ignore South Carolina law after September of 1995, I find and conclude as a matter of law that the appropriate penalty in this case is $7,500.00 per transaction for transactions occurring on or after September 25, 1995. The record reflects that there were 1,323 transactions entered into prior to September 25, 1995 and 576 transactions entered into after September 25, 1995. Thus, I award a total of Ten Million Nine Hundred Thirty-five Thousand and No/100 ($10,935,000.00) Dollars to the Plaintiffs in this matter.

2. *Prejudgement Interest*

Plaintiffs moved to recover pre-judgement interest on the award rendered in this case. I conclude Plaintiffs are not entitled to pre-judgement interest.

3. *Attorneys fees.*

Attorney's Fees and Costs

Having determined that the Defendant is liable to the Plaintiff Class for its class-wide violations of the South Carolina attorney and insurance agent preference requirement, I now turn to the issue of attorney's fees. Section 37-5-202(8) of the South Carolina Consumer Protection Code

provides for the awarding of reasonable attorney's fees and costs to prevailing plaintiffs, to be assessed against the defendants. *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987). Accordingly, the Plaintiff Class herein is entitled to recover reasonable attorney's fees and costs to be assessed against Green Tree in addition to the penalty to be paid to class members.

Plaintiffs Class Counsel have submitted a petition for fees and costs requesting that the Arbitrator award attorney's fees amounting to one-third the gross recovery generated for the benefit of the Plaintiffs Class. They have also submitted their hourly rates for non-contingent legal work paid on a prompt and regular basis. The Arbitrator has carefully reviewed the Plaintiffs Class' fee petition and supporting documentation, including the affidavit of Professor John P. Freeman, who also testified at this hearing as an expert witness in the *Lackey* case and in this case in the field of attorney's fees in the specific context of class actions. Professor Freeman was designated an expert in this field without objection. After this hearing and cross examination by Green Tree of Professor Freeman, Green Tree filed with the Arbitrator certain documents in opposition to the Plaintiff Class's fee petition including the affidavit of attorney William L. Pope opposing the requested attorney's fees. The Arbitrator has carefully and thoroughly reviewed these materials submitted by Green Tree and the hourly rate information provided by Class counsel.

South Carolina has no reported appellate cases in which attorney's fees sought by prevailing plaintiffs in a class action were contested. Nonetheless, the South Carolina Supreme Court has established certain factors which should be considered in awarding attorneys fees.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). In the instant case, S.C. Code Ann. §37-5-202(8) authorizes an award of reasonable attorney's fees and costs to the Plaintiffs' class, who prevailed in this arbitration proceeding. In deciding the amounts of attorney's fees and costs to be awarded, the Arbitrator should consider each of the following six factors: the nature, extent and difficulty of the services rendered; the time and labor necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the fee customarily charged in the locality for similar legal services; and the beneficial results obtained. Numerous recent cases decided by the South Carolina Supreme Court confirm that each of these factors must be reviewed and considered in determining the reasonableness of an attorney's fee to be awarded to a prevailing plaintiff pursuant to contract or statute. *See Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 160, 503 S.E.2d 483, 489 (1998) and *Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (1998) (recovery of fees provided under South Carolina Unfair Trade Practices Act, §39-5-10 *et seq.*); *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (recovery of fees provided under Motor Vehicle Dealers Unfair Trade Practices Act, §56-15-10 *et seq.*); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (recovery of fees provided under South Carolina Payment of Wages Act, §41-10-10, *et seq.*); *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993) and *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989) (recovery of fees provided by express terms of contract). *See also Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987) (pre-*Baron* Consumer Protection Code case in which fees were awarded under §37-5-202(8) after similar reasonableness analysis consisting of professional standing of plaintiff's attorneys, nature and extent of services rendered, complexity of issues, and beneficial results obtained). The *Baron Data Systems* case instructs that consideration of all six factors is required, but none of the six is controlling in determining the reasonable fee to be awarded. *Baron Data Systems, supra*. As Judge

Goolsby observed in *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987), a Consumer Protection Code case in which the Court of Appeals affirmed a fee award pursuant to the same statute relied upon by these Plaintiffs, "the measure of proper attorney's fees to be assessed against a party is not always the time spent." 293 S.C. at 266, 359 S.E.2d at 538-39. Where a fee award is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, supra*, citing *Singeton v. Collins*, 251 S.C. 208, 161 S.E.2d 246 (1968).

Professor Freeman is a noted expert in attorney fee awards in class actions. He has testified in courts around the country on the subject.

After consideration of each of the prescribed six factors to establish a reasonable fee award, I find and conclude as follows:

A. *The Nature, Extent, And Difficulty of The Case*

The record in this case clearly reflects that this plaintiff class action has been one of extraordinary difficulty from the outset. One must consider the complexity inherent in all class actions; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the issues surrounding the validity and effect of the arbitration clause; the appeal of the initial Circuit Court order granting class certification; and the ongoing refusal by Green Tree to cooperate with Plaintiffs' Counsel throughout the pendency of the case.

This action was commenced in March 1997, and ultimately sought class-wide relief on behalf of certain customers of Green Tree Financial Corporation and related entities for Green Tree's violation of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code. Plaintiffs moved to certify the class. Green Tree moved to compel arbitration pursuant to the arbitration clause

in its retail installment contracts. The Circuit Court first certified the Class, and thereafter, Green Tree continued with its Motion to Compel Arbitration which the Court granted. Green Tree appealed the class certification and the South Carolina Court of Appeals, and the South Carolina Supreme Court dismissed the appeals. Subsequent to the appeals, the matter proceeded forward with numerous motions and hearings, all of which are to numerous to summarize here.

The brief procedural history of the case only outlines part of the story about the difficulty of this case. The consumer finance industry collectively engaged numerous lobbyists during the 1997 legislative session in an all-out effort aimed at retroactively eliminating all class actions brought to enforce the attorney and insurance agent preference law. Counsel was forced to forego undertaking of other fee-paying matters in order to effectively represent the interests of their clients. Professor Freeman expressed his expert opinion that work undertaken by Plaintiffs' counsel was reasonable and benefited class members.

Green Tree compounded the difficulty of the case by refusing to cooperate with Plaintiffs' Counsel's discovery efforts. Counsel for the Plaintiffs were forced to prepare their case using information obtained independently by hiring and training a team of temporary workers to travel to all 46 counties in South Carolina to search public records for data on class members and their transactions. Counsel also sought out and used data obtained in the course of discovery in prior litigation involving Green Tree. Without any cooperation from Green Tree, Counsel located most of the class members and contacted them to informs them of the pendency of the litigation.

I conclude that the fees awarded in this case should fully and adequately reflect consideration of the nature, extent and difficulty of the case.

b. *The Time Necessarily Devoted to the Case*

According to their affidavit, Plaintiffs' Counsel have devoted over 3,300 attorney hours to the handling of this case and the *Lackey* case. This figure does not include any of the approximately 3,000 hours of paralegal or staff time spent in the cases. This time represents a substantial commitment of time directed to obtaining a good result for members of the class.

c. *The Professional Standing of Counsel*

Plaintiffs' Counsel in this case enjoy a high professional standing and are uniquely qualified to represent the Plaintiffs in attorney preference class actions by virtue of their experience in this specialized area of the law.

Steven W. Hamm, Mary S. League, and C. JoAnne Wessinger (Richardson, Plowden, Carpenter & Robinson, P.A.); T. Alexander Beard (Beard Law Offices); D. Michael Kelly, John D. Kassel, Bradford P. Simpson and B. Randall Dong (Suggs & Kelly Lawyers, P.A.); Mary Leigh Arnold (Mary Leigh Arnold, P.A.); Charles L. Dibble (Dibble Law Offices); Charles L.A. Terreni (Terreni Law Firm); C. Richard Kelly (C. Richard Kelly, P.A.) Thomas M. Fryar (Drose Law Firm); and Daniel W. Williams (Bedingfield & Williams) all have been involved in "attorney preference" class action cases. Professor Freeman stated in his affidavit and testimony before me that several of these lawyers "can lay claim to having virtually invented the genre of attorney preference class actions." *See* Freeman Affidavit at Paragraph 26. Apart from the testimony of Professor Freeman, I have also had the opportunity to observe directly the special competence and expertise of Class Counsel in this case over the past two years. I conclude that because of Counsel's substantial and beneficial experience in consumer class actions of this nature and magnitude, they are entitled to additional consideration in deciding attorneys' fees.

d. *Contingency of Compensation*

The Named Plaintiffs in this case all have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff's Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Counsel have placed over $36,504.47 at risk in costs advanced in the Green Tree matters, exclusive of any lobbying expenses or the value of the time spent by attorneys and staff members in the handling of this action. Counsel spent over $56,600 for the costs of lobbying to preserve Plaintiffs' cause of action in the General Assembly. A portion of these expenses should be deemed at risk for the purposes of considering the contingent nature of this case.

e. *Beneficial Results Obtained*

The benefit achieved by the Petitioners for the Plaintiff Class in the instant case has an aggregate value in excess of $10.9 Million, exclusive of costs and expenses to be awarded by this Arbitrator. This is especially noteworthy in light of the difficult conditions under which the Plaintiffs' Counsel handled this case.

f. *Customary Legal Fees for Similar Services*

In *Blum v. Stensen*, 465 U.S. 886, 104 S. Ct. 1541(1984), the U.S. Supreme Court held that customary fees for like work are "to be calculated according to the prevailing market rates in the relevant community." 104 S. Ct. at 1547 (emphasis added).

As the South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-

third to one-half of the gross recovery. While *Global Protection Corp.* was not a class action, its difficulty and complexity make it relevant here.

In the class action context, courts have likewise awarded substantial fees based upon a percentage of recovery. The "relevant community" for like work in this case is that community of class action litigation lawyers involved in complex civil cases. Professor Newberg, cited *supra*, has written that "the relevant community may potentially be the forum, out-of-state forums, or a uniform national rate." Newberg, *supra*, note 23 §414 at 142.

Citing such circumstances as the complexity and expense of class action litigation, multiple parties, and the involvement of "national defendants who normally will be represented by national, as well as local counsel," Professor Newberg states:

> Courts have recognized that these and other circumstances make a local forum rate for compensation . . . an inappropriate and illogical standard, in contrast to . . . the growing adoption by courts of national rate standards.
>
> Newborn, *supra*, note 23 §415 at 143.

Professor Freeman attached to his affidavit in support of the fee request in this case copies of two other recent class action cases in which he testified about fee reasonableness and other issues. In one of these cases, *In re State of Florida v. American Tobacco Co.* (Arbitration Award dated September 11, 1998), the arbitrators awarded plaintiff's counsel a fee of in excess of $3.4 Billion. In the other, *Ramos v. Phillip Morris Companies, Inc.*, 743 So.2d 24 (Fl. App. 1999), the Florida Court of Appeals affirmed a fee award of over $46 Million. These cases illustrate the fact that class counsel are very well compensated when they obtain a substantial benefit for Class members. The reasonableness of attorney fee

awards in class actions should not be confined to any single element such as the number of hours spent in achieving a beneficial result for the class.

The class action cases cited by Professor Freeman and by Class Counsel were virtually all settled, rather than tried. Because this case required the Plaintiffs to brief and argue an appeal and fight off two efforts by Green Tree to stop the litigation with an injunction; engage in an expensive, time-consuming legislative battle; independently gather statewide information without the aid of traditional discovery; and try the case before an arbitrator, they are entitled to a reasonable attorneys fee of $3,645,000.00 in addition to the judgement of $10,935,000.00 obtained on behalf of the Plaintiffs Class.

4. *Unclaimed Funds and Administration of Class*

Counsel for Plaintiffs have requested that any funds awarded to class members who cannot be located after reasonable efforts to locate all intended payees be provided to the South Carolina School of Law, South Carolina Habitat for Humanity, Shriner's Hospital and Global Outreach. After careful consideration, I conclude that the request to distribute unclaimed funds to the above referenced organizations should be granted. Six months after Green Tree tenders the applicable amount referenced above plus any applicable interest, class counsel shall distribute any remaining unclaimed funds by tendering 75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach.

Any interest earned after deposit of the applicable judgement amount, including interest, if any, into Plaintiffs' Counsel trust account may be applied to reasonable administrative costs. In recognition for the named Plaintiffs willing to serve as class representatives and to assist in this case on behalf of all class members, the named Plaintiffs shall receive the distribution noted below. After payment of reasonable

administrative costs, such remaining interest shall be distributed to the Named Class Representatives in an amount not to exceed $50,000, divided equally among the class representatives on a per transaction basis. Any remaining amount after payment of reasonable administrative costs and payment to the named class representatives shall be paid to the Cy Pres. Within 45 days of final distribution of the unclaimed funds Plaintiffs' counsel shall file an accounting with the Court. It is expressly directed that class counsel utilize their best efforts to locate all class members and award them the $5,000 or $7,500.00 referenced in this Order. Any costs associated with efforts to locate class members associated with unclaimed funds shall be deducted from the $5,000 or $7,500 allocated to such class members when located if funds from interest paid into the trust account are not sufficient to cover such costs.

Plaintiffs have also requested that I issue an Order authorizing the Plaintiffs to seek addresses of any class members who cannot be located based upon addresses currently maintained by Class Counsel. Accordingly, I have attached a separate Order authorizing the counsel for Plaintiffs to obtain addresses from credit reporting agencies in accordance with the Federal Credit Reporting Act 15 U.S.C. § 1681b(a)(1).

AWARD

Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, reckless, wanton and egregious, and therefore, awarded Plaintiffs the sum of $10,935,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in

the amount of $18,252 which is one half of $36,504. I further conclude that a reasonable attorneys fee of $3,645,000.00 should be awarded to members of the Plaintiffs' class.

Thus, I conclude that a judgment should be entered against Green Tree in the total amount of $14,598,252.00

IT IS SO AWARDED.

/s/ Tom J. Ervin
Arbitrator TOM J. ERVIN

July 24, 2000

APPENDIX E

IN ARBITRATION
STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
COURT OF COMMON PLEAS

[Filed Jul 25, 2000]

Civil Action No. 96-CP-06-073

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class of
all others similarly situated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE FINANCIAL SERVICES CORP., a/k/a GREEN TREE ACCEPTANCE CORP. n/k/a CONSECO FINANCE, INC.
Defendant.

FINAL ORDER AND AWARD IN ARBITRATION

I.

This binding class arbitration deals with Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer

Protection Code ("Code") in its manufactured home transactions through September 25, 1995.[1]

A. PROCEDURAL HISTORY

This action was commenced by Plaintiffs against Green Tree in the Court of Common Pleas for Barnwell County, South Carolina (Civil Action No. 96-CP-06-073), by the filing of the Summons and Complaint as a class action on May 28, 1996. (Plaintiffs' Exhibit Notebook 2, Item 47 (hereinafter "Notebook")). On July 30, 1996, Green Tree filed an Answer asserting various defenses. (Notebook 2, Item 56). On October 1, 1996, the Plaintiffs filed a Motion for Class Certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. In response, Green Tree filed a motion to Stay the Matter and to Compel Arbitration. The Honorable Rodney A. Peeples denied Green Tree's motion to compel arbitration and held that the arbitration clause was unconscionable.

Green Tree appealed Judge Peeples' ruling. The Court of Appeals reversed and remanded the case to the lower court, *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). (Notebook 2, Item 48). On July 23, 1998, the parties entered into a Consent Order entered by

---

[1] This original class action consisted of all consumer retail installment transactions secured by real estate located in South Carolina entered into within three years prior to May 28, 1996. At the request of Green Tree, the action was bifurcated into two separate class actions: *Lackey v. Green Tree* (this case) involving manufactured housing transactions prior to September 25, 1995 and *Workman v. Green Tree* involving manufactured housing transactions after September 25, 1995. Subsequently, Green Tree requested that all home improvement transactions be removed from this case, specifically including one of the named plaintiffs, Daniel B. Lackey and joined in the separate action identified as *Bazzle Green Tree*. Green Tree's request was granted. The *Workman* and *Bazzle* cases are now separate class actions and are not addressed in this Order.

Judge Rodney A. Peeples submitting the matter to binding arbitration. (Notebook 2, Item 12).

On August 19, 1998, a hearing was held before this Arbitrator on the issue of whether or not the Plaintiffs' class action could proceed in arbitration. I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree. Green Tree's binding arbitration clause provides the arbitrator with broad powers. The arbitration clause prepared by Green Tree states:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this

> contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

On September 22, 1998, Green Tree initiated a declaratory judgment action in federal court and filed a Motion for Preliminary Injunction asserting federal jurisdiction and seeking to prohibit the Arbitrator from certifying a class in arbitration. *Green Tree Financial Corp. v. Lackey, et al.*, Case No. 3:98-2750-17 (D.S.C. 1998). After a hearing, the Honorable Joseph F. Anderson, Jr. denied Green Tree's Motion and dismissed Green Tree's declaratory judgment action for lack of subject matter jurisdiction. (Notebook 2, Item 18).

On November 23, 1998, a hearing on Plaintiffs' Motion for Class Certification was held before the Arbitrator. Green Tree's counsel attended the hearing but declined to participate in the argument of the Motion even though Green Tree and its

counsel acknowledged that Green Tree had been given adequate notice and an opportunity to be heard. The Arbitrator found that the requirements for class certification were met and that class certification was appropriate. (Notebook 2, Item 49).

On December 4, 1998, Green Tree filed another declaratory judgment action and petition for injunction in State Court in Barnwell County as Civil Action 98-CP-06-278. (Notebook 2, Item 41). Simultaneous with filing the declaratory action in State Court, Green Tree also filed its Motion to Stay the arbitration proceedings. On January 6, 1999, The Honorable Gary E. Clary held a hearing on Green Tree's motion to stay these arbitration proceedings and denied Green Tree's Motion to Stay.

B. RULINGS BINDING IN THIS CASE.

On August 19, 1999, the parties to this arbitration presented memorandums and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination of the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South Carolina Code Ann. Section §37-10-105 as amended by the General Assembly in 1997.
2. Green Tree was the "creditor" for the manufactured housing transactions it funded and was subject to the preference requirements contained in S.C. Code Ann. §37-10-102(a).
3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.

4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.
5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.
6. Transactions closed outside of the state of South Carolina would not be included in the certified class.
7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

On January 28, 2000, a pre-trial conference was held. At the time of the conference the parties entered into a Consent Agreement bifurcating the case, and postponing trial for all class members with contracts dated after September 25, 1995 for a later arbitration proceeding. (Notebook 2, Item 50). The Consent Agreement also postponed trial for class members with home improvement contracts secured by real estate, which is now identified as *Bazzle v. Green Tree,* (See Footnote 1).

C. THE RECORD

The record in this case is attached to this Order and is identified as Exhibit 1.

D. FINDINGS OF FACT

1. *The Transactions.*

The Plaintiffs and all others similarly situated in this case entered into standard form consumer installment contracts and security agreements with Green Tree secured by real property that are subject to the South Carolina Consumer Protection Code. (See Notebook 1, Items 9 & 10). The contracts and agreements entered into by the Plaintiffs and Green Tree were prepared by Green Tree and obligated each

consumer to make monthly payments. In each of the transactions, the consumer completed a Green Tree application with the assistance of a Green Tree dealer. Green Tree's dealer then submitted the application to Green Tree for approval. (*Id.*). The Green Tree application forms contained no attorney and insurance agent preference notice. No separate attorney and insurance agent preference form was provided to the consumer at the time of credit application. Green Tree verified the consumer's employment and income and determined the creditworthiness of the consumer. (*Id.*). Green Tree would then notify its dealer if credit was granted. If credit was not approved, Green Tree would notify the consumer directly in writing of the denial of credit. (Notebook 1, Item 3, Usry Affidavit).

The record shows that Green Tree was the "creditor" from the beginning of the transaction. Green Tree was the creditor before any assignment and before it could claim the status of assignee. If credit was granted, Green Tree alone set the terms of the credit. Green Tree determined the rate of interest. Green Tree determined if the consumer was required to meet any special conditions. Green Tree obtained an appraisal on the real property. Green Tree obtained a title search. Green Tree prepared the installment note. Green Tree prepared the mortgage. Green Tree specified on the face of the mortgage that it was to be returned to Green Tree. Green Tree forwarded the prepared documents to its dealer. The dealer would then secure the signatures of the consumers. Simultaneously with the closing, the note and mortgage were assigned to Green Tree. Typically, no attorney was present at the time of closing. (Notebook 2, Items 11 & 23). Green Tree funded the transaction after the consumer had reported satisfaction with the set up of the home. Green Tree would then issue checks to its dealers. (Notebook 1, Item 3).

2. *Green Tree Had Actual Notice of the Attorney and Insurance Agent Preference Statute*

This is not the first time Green Tree has been sued in South Carolina for noncompliance with the preference statute. Prior to the filing of this case in 1996 and the subsequent class certification, Green Tree was named in one of the first cases involving allegations of a violation of the preference statute. *Broomfield v. Green Tree Financial Corp.* (Civil Action No. 94-CP-08-1786).

On December 4, 1994, Robert and Christine Broomfield filed an amended complaint against Green Tree and its agent seeking recovery under a $15,000.00 note and mortgage, including a cause of action for violation of the attorney and insurance agent preference statute §37-10-102. (Notebook 2, Item 57). At no time during the course of the *Broomfield* case did Green Tree deny that it failed to adhere to the attorney and insurance agent preference statute. In late November 1996, the case was called for trial. The morning the jury was selected, the case was settled. Green Tree agreed to pay Mr. and Mrs. Broomfield the sum of $50,000.00 and further agreed to satisfy the note and mortgage discharging them from any further obligation to Green Tree. Throughout the course of discovery in this case, Green Tree repeatedly acknowledged that it did not comply with the attorney and insurance agent preference statute.

In the *Broomfield* case, Donald McConnell, Green Tree's in house counsel, was designated by Green Tree's [sic] as its Rule 30(b)(6) witness. On September 8, 1996, Mr. McConnell's deposition was taken. Mr. McConnell unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent. Mr. McConnell was completely unaware of the attorney and insurance agent preference requirement and only learned of it through the pending lawsuit. (Notebook 2, Item 17).

Prior to Mr. McConnell's deposition, Keith Troup, a South Carolina manager for Green Tree was deposed by counsel for the Broomfields. Mr. Troup testified that at no time was a consumer provided with notice of the borrower's right to select counsel or an insurance agent. (Notebook 2, Item 23).

The *Broomfield* case clearly establishes that in late 1994 that Green Tree had actual notice of the attorney and insurance agent preference statute. Furthermore, it corroborates Green Tree's admission in this case that it did not comply with the attorney and insurance agent preference statute:

> It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to 1995, the "attorney and insurance agent preference" requirement as expounded in *Tilley* was not complied with.
>
> Memorandum of Green Tree Financial Corporation dated June 25, 1999, p.3

Green Tree does not argue that it complied with the attorney and insurance agent preference statute prior to September 25, 1995. Green Tree does not deny that it did not have policies or procedures relating to the attorney and insurance agent preference statute prior to September 25, 1995.

E. CLASS MEMBERS

Green Tree does not dispute that, originally, there were 1,964 loans or transactions involved in the present proceeding with absolutely no evidence of compliance with the preference statute. The present class now consists of 1,840 transactions after transferring 73 transactions with no arbitration clause to the *Green Tree v. Flemmings* case, which was certified as a class action by Judge McKellar on April 26, 2000. An additional 36 transactions were removed from the class pursuant to my ruling that transactions closed outside of

South Carolina would not remain in the instant class. Five transactions with some evidence of an attorney and insurance preference form were moved to the *Workman v. Green Tree* case referenced in footnote 1 of this Order. An additional 10 transactions were removed as a result of opt-outs by the affected consumers. (Notebook 4, Item 57; Transcript of May 31, 2000 Hearing, Exhibit 2) A list of the remaining 1,840 class members are attached as Exhibit 2 to this Order. Green Tree was given thirty (30) days to provide a list of any additional members which should be taken out of the class and the factual basis for its position. Green Tree has not provided such a list or basis; therefore, it has waived any right to do so. I have retained jurisdiction over the *Workman* class and this Order does not address issues in that case.

3. CONCLUSIONS OF LAW

Based upon the ruling of the South Carolina Supreme Court in *Tilley v. Pacesetter,* 333 S.C. 33, 508 S.E.2d 16 (1998) and the facts shown on the record in this case, Plaintiffs are entitled as a matter of law, to a decision that Green Tree is liable for violating S.C. Code Ann. Section 37-10-102(a).

As a major corporation doing business in South Carolina for an extended period of time, Green Tree, based on its continuing non-compliance with the preference statute, has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement. Despite Green Tree's vast financial resources, it took no affirmative action to educate itself on the requirements of South Carolina's attorney preference statute. Green Tree's former Chief Counsel, Richard G. Evans, testified that he was responsible for Green Tree's legal compliance. Mr. Evans testified that he was "not aware of the attorney and insurance agent preference statute prior to 1995."

The attorney and insurance agent preference statute, enacted in the South Carolina Consumer Protection Code in 1982, first came to the attention of Green Tree's corporate counsel based on information obtained from a local employee in the South Carolina office in 1995. The deposition testimony of Ira Usry is instructive in looking at Green Tree's continuing failure to comply with the preference statute:

On page 15, line 8:

Question: When Green Tree decided to go into that part of the business in South Carolina, were you involved in any way in determining what was necessary to do that properly in terms of the laws of South Carolina and the forms necessary?

Answer: That would be provided by corporate legal and the audit area in Saint Paul.

Question: You didn't have the legal department or legal access of South Carolina inside of Green Tree?

Answer: No. All that was handled by corporate people.

Then on page 19, line 3:

Question: Did you have contact, you personally or anyone at Green Tree from Saint Paul, for that matter, have contact from time to time with any state agencies of South Carolina?

Answer: No.

Then on Page 21, line 17:

Question: Do you recall when you personally learned about the . . . learned that there may be some requirement concerning notice to consumers of the right to choose an attorney or the provider of any required insurance of South Carolina?

Answer: I cannot give you the date or the time or the year. I remember that I had someone mention to me that this is something we need to check into. We did so and tried to make the changes from there.

Then on Page 22, line 8:

Question: This memo, Exhibit Two, is dated September 25, 1995. As far as you know, prior to that time, had anyone at Green Tree made any efforts to inquire into what we referred to?

Answer: I don't think we had knowledge of it.

Then on Page 23, line 14:

Question: Before this memo was sent out on September of 1995, you probably already answered this question because you said you didn't have any knowledge of it, but any attorneys that had been involved in any way in any of the transactions prior to that time, had any of them advised anyone at Green Tree, to your knowledge, that there was any problem with the credit application form or if they had to have an attorney preference notice in the file?

Answer: Never did and at that point we wondered why nobody ever said anything.

Then on Page 28, line 7:

Question: How did you learn about the attorney preference requirement?

Answer: I believe we had an employee who came in one day and said there's a document that we don't have that we need possibly to look into.

Question: Do you remember who that employee was?

Answer: No, not specifically, no.

Question: Would it have been a subordinate of yours?

Answer: Yes.

Question: Was it that conversation with that employee that led you eventually to issue this memorandum on September 25th?

Answer: I would imagine so, yes.

Question: Did you conduct any investigation after that conversation?

Answer: I think what we did after that conversation, frankly, was call someone and said, tell us about this document and from then on, we contacted probably by memo or by phone or whatever the corporate office and said, we thought we might need to do something here.

Then on Page 30, line 13:

Question: Who would you have contacted at corporate?

Answer: I couldn't tell you. We were assigned specific lawyers from time to time. They were inaccessible. So, you would go for anyone. It could have been voice mail.

Question: You were assigned specific lawyers at corporate?

Answer: Yes.

Question: Were these South Carolina lawyers?

Answer: No.

Then on Page 32, line 11:

Question: Right. You felt it was something that needed to be done?

Answer: Yes.

Question: But if I understand your job at Green Tree, compliance was not necessarily sort of legal compliance with closing procedures. It was not part of your job responsibility, was it?

Answer: I wasn't to determine what documents would be used in closing.

Question: But nevertheless, this was important enough to do it?

Answer: We tried to do the right thing.

Then on Page 38, line 2:

Question: But they weren't in the practice of sending you regular updates on South Carolina law?

Answer: No.

Question: Was that their function?

Answer: Their function was to assist us on all legal issues and typically any legal issues in South Carolina for a few lawsuits.

I have considered the record and evidence in this case with regard to issue of Green Tree acting as the "creditor" in conjunction with its real estate secured transactions. The deposition testimony of Mr. Usry is also instructive and important. On Page 58, line 2, regarding the issue of whether Green Tree was acting as "creditor":

Answer: We had control of the credit. We had control to the point we would cut a check when we thought things were the way they should be.

Then on Page 58, Line 9:

Question: You certainly had control of the application process.

Answer: If you want to call it control. We took the application that was submitted to us and we made a decision.

Question: It was your decision and your discretion to submit or reject?

Answer: To approve or deny credit, yes.

And finally, on page 67, line 1:

Question: To your knowledge, did Green Tree . . . well, I had asked that. Other than your memorandum, did you ever receive any communication from Green Tree?

Answer: Well, no.

Question: Did you ever receive any communication from Green Tree regarding the attorney preference requirement before September 25, 1995?

Answer: Not that I recall.

All the testimony and evidence presented clearly shows an ongoing pattern and practice of disregard for the applicable South Carolina law. That pattern and practice began as a careless or negligent attitude. One of the factors that the Arbitrator must examine is the attitude and conduct of the defendant in determining an appropriate penalty.

While the plaintiffs as a class did not attempt to show actual damages, certainly the plaintiffs suffered injury and loss of their state law right to be advised of their attorney and insurance agent preference. Plaintiffs were denied any knowledge of this important provision of South Carolina law, which the Legislature chose to enact and reenact for many years. I find that plaintiffs in this class were harmed, even if it is difficult put a dollar figure on their injury. I must look to the attitude and conduct of the defendants and their total failure to comply in establishing an appropriate penalty in the range provided by S.C.. Code Ann. § 37-10-105. As a matter of public policy, the General Assembly intended to protect consumers in secured transactions of this nature when it placed the preference statute in the South Carolina Consumer Protection Code.

With regard to an appropriate penalty, the arbitrator should look at the totality of the circumstances. That decision cannot

be made in a vacuum. The case law says that the requirements of the penal statute must be applied in a manner which results in fairness and justice to the parties. The record in this case reflects that Green Tree did have corporate legal counsel and yet no reasonable or direct efforts were taken by Mr. Evans or his staff to:

1) learn of the South Carolina attorney and insurance agent preference statutory provision, and

2) More importantly, once it came to Green Tree's attention, to take some affirmative action to bring Green Tree into compliance with the provisions of the statute.

Surprisingly, one of Green Tree's regional managers had to learn about the preference requirement from a subordinate employee. It is shocking to learn that Green Tree, one of the leaders in the lending industry, took such a casual approach to this important legal requirement so as to only stumble upon it after a local employee brought it to the regional manager's attention. I find that Green Tree was negligent and careless. This inquiry must go another step and look at the totality of the circumstances. The real question then becomes: What did Green Tree do once it finally learned about the preference statute? The answer to that question is the most shocking and disturbing aspect of this case. While Green Tree presented testimony about a policies and procedures manual, Green Tree did not introduce a policies and procedures manual that addressed the steps needed to comply with the preference statute.

Mr. Evans testified that had Green Tree known about the preference statute, it would have complied by providing its consumer borrowers with the necessary forms. However, ignorance of the law is neither an excuse nor a defense. Therefore, a penalty is appropriate in this case to punish Green Tree for its non-compliance and its willful failure to

take the necessary steps to comply once it learned of the non-compliance through its local office in South Carolina. Mr. Evans testified that South Carolina was a "high user state" in terms of the manufactured housing business. However, Mr. Evans was unable to produce any written record to show that any attorney opinion was ever requested on compliance with the attorney preference statute. Mr. Evans admitted, "Maybe our standards are too low. I wish we had known earlier. We tried to comply (Notebook 6, Item 37; Transcript of March 6, 7 & 8, 2000 Hearing, p. 340)." The record in this case reveals no Green Tree efforts to actually comply with the law prior to September 25, 1995.

After hearing all the testimony and reviewing all the evidence and considering the relevant factors in accessing an appropriate penalty, I find and conclude as a matter of law that the reasonable and appropriate penalty in this case is $5,000 per transaction for transactions entered through September 25, 1995. Having determined that the class members in this case number 1,840, the penalty to be awarded is $9,200,000.00.

F. PRE-JUDGMENT INTEREST

Plaintiffs moved to recover pre-judgment interest on the award rendered in this case. I conclude Plaintiffs are not entitled to pre-judgment interest.

G. ATTORNEY'S FEES AND COSTS

Having determined that the Defendant is liable to the Plaintiff Class for its class-wide violations of the South Carolina attorney and insurance agent preference requirement, I now turn to the issue of attorney's fees. Section 37-5-202(8) of the South Carolina Consumer Protection Code provides for the awarding of reasonable attorney's fees and costs to prevailing plaintiffs, to be assessed against the defendants. *Freeman v. A&M Mobile*

Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987). Accordingly, the Plaintiff Class herein is entitled to recover reasonable attorney's fees and costs to be assessed against Green Tree in addition to the penalty to be paid to class members.

Plaintiff Class Counsel have submitted a petition for fees and costs requesting that the Arbitrator award attorney's fees amounting to one-third the gross recovery generated for the benefit of the Plaintiff Class. They have also submitted their hourly rates for non-contingent legal work paid on a prompt and regular basis. The Arbitrator has carefully reviewed the Plaintiff Class's fee petition and supporting documentation, including the affidavit of Professor John P. Freeman, who also testified after the *Bazzle* hearing before me as an expert witness for the *Lackey* and *Bazzle* cases in the field of attorney's fees in the specific context of class actions. Professor Freeman was designated an expert in this field without objection. Professor Freeman is a noted expert in attorney fee awards in class actions. He has testified in courts around the country on the subject. After the *Bazzle* hearing and Green Tree's cross examination of Professor Freeman, Green Tree filed certain documents in opposition to the Plaintiff Class's fee petition including the affidavit of attorney William L. Pope opposing the requested attorney's fees. The Arbitrator has carefully and thoroughly reviewed the materials submitted by Green Tree and the hourly rate information provided by Class Counsel.

South Carolina has no reported appellate cases in which attorney's fees sought by prevailing plaintiffs in a class action were contested. Nonetheless, the South Carolina Supreme Court has established certain factors which should be considered in awarding attorneys fees. The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). In the instant case, S.C. Code Ann. §37-5-

202(8) specifically authorizes an award of reasonable attorney's fees and costs to the Plaintiff class, who prevailed in this arbitration proceeding. In deciding the amounts of attorney's fees and costs to be awarded, the Arbitrator should consider each of the following six factors: the nature, extent and difficulty of the services rendered; the time and labor necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the fee customarily charged in the locality for similar legal services; and the beneficial results obtained. Numerous recent cases decided by the South Carolina Supreme Court confirm that each of these factors must be reviewed and considered in determining the reasonableness of an attorney's fee to be awarded to a prevailing plaintiff pursuant to contract or statute. *See Global Protection Corp. v. Halbersberg,* 332 S.C. 149, 160, 503 S.E.2d 483, 489 (1998) and *Taylor v. Medenica,* 331 S.C. 575, 503 S.E.2d 458 (1998) (recovery of fees provided under South Carolina Unfair Trade Practices Act, §39-5-10 *et seq.*); *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (recovery of fees provided under Motor Vehicle Dealers Unfair Trade Practices Act, §56-15-10 *et seq.*); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (recovery of fees provided under South Carolina Payment of Wages Act, §41-10-10, *et seq.*); *Blumberg v. Nealco,* 310 S.C. 492, 427 S.E.2d 659 (1993) and *Baron Data Systems, Inc. v. Loter,* 297 S.C. 382, 377 S.E.2d 296 (1989) (recovery of fees provided by express terms of contract). *See also Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987) (pre-*Baron* Consumer Protection Code case in which fees were awarded under §37-5-202(8) after similar reasonableness analysis consisting of professional standing of plaintiff's attorneys, nature and extent of services rendered, complexity of issues, and beneficial results obtained). The *Baron Data Systems* case instructs that consideration of all six factors is required, but none of the six is controlling in determining the reasonable

fee to be awarded. *Baron Data Systems, supra.* As Judge Goolsby observed in *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987), a Consumer Protection Code case in which the Court of Appeals affirmed a fee award pursuant to the same statute relied upon by Plaintiffs, "the measure of proper attorney's fees to be assessed against a party is not always the time spent." 293 S.C. at 266, 359 S.E.2d at 538-39. Where a fee award is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, supra,* citing *Singleton v. Collins*, 251 S.C. 208, 161 S.E.2d 246 (1968).

After consideration of each of the prescribed six factors to establish a reasonable fee award, I find and conclude as follows:

1. *The Nature, Extent, And Difficulty of The Case*

The record in this case clearly reflects that this plaintiff class action has been one of extraordinary difficulty from the outset. One must consider the complexity inherent in all class actions; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the issues surrounding the validity and effect of the arbitration clause; the appeal of the initial Circuit Court order finding the arbitration clause unconscionable and unenforceable; the unique issues raised in the case relating to class arbitration; and the ongoing refusal by Green Tree to cooperate with Plaintiffs' Counsel on discovery and other matters.

This class action was commenced in May 1996, seeking class-wide relief on behalf of certain customers of Green Tree Financial Corporation and related entities for Green Tree's violation of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code. Green Tree moved to compel arbitration pursuant to the arbitration clause in its retail installment contracts. The Circuit Court issued its order finding that the arbitration

clause was unconscionable and therefore unenforceable. Green Tree appealed, and the South Carolina Court of Appeals, in *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388; 498 S.E.2d 898 (1998), reversed and remanded this class action to the Circuit Court for referral to arbitration. At that time, the parties consented to Arbitration pursuant to the Court of Appeals Order and chose this Arbitrator to hear the case (Notebook 5, Item 15). After the case was referred to arbitration, the Plaintiffs continued to move for class certification. The Arbitrator, after reviewing the broad language in the arbitration clause and considering all matters raised by Green Tree, certified the class in the arbitration proceeding. Green Tree contested the Arbitrator's power to certify and adjudicate the class. In September 1998, Green Tree filed an action in the United States District Court for the District of South Carolina seeking a temporary injunction halting the adjudication of this lawsuit as a class action. The Plaintiffs successfully defended against the injunction in the federal forum on the ground of lack of subject-matter jurisdiction. Thereafter, in December 1998, Green Tree sued the Plaintiffs in the Circuit Court, again seeking to enjoin the Arbitrator from adjudicating this case as a class action. The Plaintiffs again were successful in defending against Green Tree's procedural attempts to thwart their efforts on behalf of the class, and the case proceeded to trial before the Arbitrator in March of 2000.

The brief procedural history of the case only outlines part of the story about the difficulty of this case. The consumer finance industry collectively engaged numerous lobbyists during the 1997 legislative session in an all-out effort aimed at retroactively eliminating all class actions brought to enforce the attorney and insurance agent preference law. Counsel was forced to forego undertaking of [sic] other fee-paying matters in order to effectively represent the interests of their clients. Professor Freeman expressed his expert

opinion that the work undertaken by Plaintiffs' Counsel was reasonable and benefited class members.

Green Tree compounded the difficulty of the case by refusing to cooperate with Plaintiffs' Counsel's discovery efforts. Counsel for the Plaintiffs were forced to prepare their case using information obtained independently by hiring and training a team of workers to travel to all 46 counties in South Carolina to search public records for data on class members and their transactions. Counsel also sought out and used data obtained in the course of discovery in prior litigation involving Green Tree. Without cooperation from Green Tree, Counsel located most of the class members and began contacting them to inform them of the pendency of the litigation.

I conclude that the fees awarded in this case should fully and adequately reflect consideration of the nature, extent and difficulty of the case.

2. *The Time Necessarily Devoted to the Case*

According to their affidavits, Plaintiffs' Counsel have devoted over 3,300 attorney hours to the handling of this case and the *Bazzle* case. This figure does not include any of the approximately 3,000 hours of paralegal or staff time spent in the case. This time represents a substantial commitment of time directed to obtaining a good result for members of the class.

3. *The Professional Standing of Counsel*

Plaintiffs' Counsel in this case enjoy a high professional standing and are uniquely qualified to represent the Plaintiffs in attorney preference class actions by virtue of their experience in this specialized area of the law.

Steven W. Hamm, Mary S. League, and C. JoAnne Wessinger (Richardson, Plowden, Carpenter & Robinson, P.A.); T. Alexander Beard (Beard Law Offices); D. Michael

Kelly, John D. Kassel, Bradford P. Simpson and B. Randall Dong (Suggs & Kelly Lawyers, P.A.); Mary Leigh Arnold (Mary Leigh Arnold, P.A.); Charles L. Dibble (Dibble Law Offices); Charles L.A. Terreni (Terreni Law Firm); C. Richard Kelly (C. Richard Kelly, P.A.) Thomas M. Fryar (Drose Law Firm); and Daniel W. Williams (Bedingfield & Williams) all have been involved in "attorney preference" class action cases. Professor Freeman stated in his affidavit and testimony before me that several of these lawyers "can lay claim to having virtually invented the genre of attorney preference class actions." *See* Freeman Affidavit at ¶26. Apart from the testimony of Professor Freeman, I have also had the opportunity to observe directly the special competence and expertise of Class Counsel in this case over the past two years. I conclude that because of Counsel's substantial and beneficial experience in consumer class actions of this nature and magnitude, they are entitled to additional consideration in deciding attorney's fees.

4. *Contingency of Compensation*

The Named Plaintiffs in this case all have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff's Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Counsel placed $36,504.47 at risk in costs advanced in the Green Tree matters, exclusive of any lobbying expenses or the value of the time spent by attorneys and staff members in the handling of this action. Counsel spent over $56,600 for the costs of lobbying to preserve Plaintiffs' cause of action in the General Assembly. A portion of these expenses should be deemed at risk for the purposes of considering the contingent nature of the case.

5. *Beneficial Results Obtained*

The benefit achieved by the Petitioners for the Plaintiff Class in the instant case has an aggregate value in excess of

$9.2 Million, exclusive of costs and expenses to be awarded by this Arbitrator. This is especially extraordinary in light of the difficult conditions under which the Plaintiffs' Counsel handled this case.

6. *Customary Legal Fees for Similar Services*

In *Blum v. Stensen,* 465 U.S. 886, 104 S.Ct. 1541 (1984), the U.S. Supreme Court held that customary fees for like work are "to be calculated according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547 (emphasis added).

As the South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg,* 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. While *Global Protection Corp.* was not a class action, its difficulty and complexity make it relevant here.

In the class action context, courts have likewise awarded substantial fees based upon a percentage of recovery. The "relevant community" for like work in this case is that community of class action litigation lawyers involved in complex civil cases. Professor Newberg, cited *supra,* has written that "the relevant community may potentially be the forum, out-of-state forums, or a uniform national rate." Newberg, *supra*, note 23 §414 at 142.

Citing such circumstances as the complexity and expense of class action litigation, multiple parties, and the involvement of "national defendants who normally will be represented by national, as well as local counsel," Professor Newberg states:

> Courts have recognized that these and other circumstances make a local forum rate for compensation . . . an inappropriate and illogical standard, in contrast to

> . . . the growing adoption by courts of national rate standards.
>
> Newberg, *supra*, note 23 §415 at 143.

Professor Freeman attached to his affidavit in support of the fee request in this case copies of two other recent class action cases in which he testified about fee reasonableness and other issues. In one of these cases, *In re State of Florida v. American Tobacco Co.,* (Arbitration Award dated September 11, 1998), the arbitrators awarded plaintiff's counsel a fee of in excess of $3.4 Billion. In the other, *Ramos v. Philip Morris Companies, Inc.,* 743 So.2d 24 (Fl. App. 1999), the Florida Court of Appeals affirmed a fee award of over $46 Million. These cases illustrate the fact that class counsel are very well compensated as a rule when they provide a benefit to class members. The reasonableness of attorney fee awards in class actions should not be confined to any single element such as the number of hours spent in achieving a beneficial result for the class.

The class action cases cited by Professor Freeman and by Class Counsel were virtually all settled, rather than tried. Because this case required the Plaintiffs to brief and argue an appeal and fight off two efforts by Green Tree to stop the litigation with an injunction; engage in an expensive, time-consuming legislative battle; independently gather statewide information without the aid of traditional discovery; and try the case before an arbitrator, they are entitled to a reasonable attorneys fee of $3,066,666.00 in addition to the judgment of $9,200,000.00 obtained on behalf of the Plaintiff Class.

7. *Conclusion*

Based upon a careful review of the materials, cases, affidavits and testimony submitted and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that a reasonable fee of $3,066,667.00 should be awarded for counsel for the plaintiff class in

addition to the civil penalty award to be paid to members of the plaintiffs class in the amount of $9,200,000. I also find the plaintiffs should be reimbursed for their reasonable costs associated with the prosecution of this case in the amount of $18,252 which is one half of the $36,504.47.

II. UNCLAIMED FUNDS AND ADMINISTRATION OF CLASS

Counsel for plaintiffs have requested that any funds awarded to class members who cannot be located after reasonable efforts to locate all intended payees be provided to the South Carolina School of Law, South Carolina Habitat for Humanity, Shriner's Hospital and Global Outreach. After careful consideration, I conclude that the request to distribute unclaimed funds to the above referenced charitable organizations should be granted. Six months after Green Tree tenders the then applicable judgment amount, including applicable interest class counsel shall distribute any remaining unclaimed funds by tendering 75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital, and 8% to Global Outreach.

Any interest earned after deposit of the applicable judgment amount including interest, if any, into Plaintiffs Counsel's trust account may be applied to reasonable administrative costs. In recognition of the Named Plaintiffs willingness to serve as class representatives and to assist in the prosecution of this case on behalf of all class members, the named plaintiffs shall receive a distribution as noted below. After payment of reasonable administrative costs such remaining interest shall be distributed to the Named Class Representatives in an amount not to exceed $50,000 divided equally among such class representatives on a per transaction basis. Any funds remaining after payment of reasonable

administrative costs and payment to the named class representatives shall be paid to the Cy Pres. Within 45 days of final distribution of any unclaimed funds, Plaintiffs counsel shall file an accounting with the appropriate court. It is expressly directed that class counsel utilize their best efforts to locate all class members and award them the $5,000 referenced in this Order. Any costs associated with efforts to locate class members associated with unclaimed funds shall be deducted from the $5,000 allocated to such class members when located if funds from interest paid into the trust account are not sufficient to cover such costs.

Plaintiffs have also requested that I issue an Order authorizing the Plaintiffs to seek addresses from credit reporting agencies of any class members who cannot be located based upon addresses currently available to Class Counsel. Accordingly, I have attached a separate Order authorizing the counsel for Plaintiffs to obtain addresses from credit reporting agencies in accordance with the Federal Credit Reporting Act 15 U.S.C. § 1681b(a)(1).

AWARD

Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, wanton and egregious, and therefore, awarded Plaintiffs the sum of $9,200,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in the amount of $18,252. I further conclude that a reasonable attorneys fee of $3,066,666.00 should be awarded to members of the Plaintiffs' class.

Thus, I conclude that a judgment should be entered against Green Tree in the total amount of $12,284,918.

IT IS SO AWARDED.

/s/ Tom J. Ervin

Arbitrator TOM J. ERVIN

July 24, 2000

APPENDIX F

ARBITRATION AGREEMENT CONTAINED IN CONSUMER RETAIL INSTALLMENT

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we

retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

MARY LEIGH ARNOLD
MARY LEIGH ARNOLD, P.A.
P.O. Box 265
Mt. Pleasant, SC 29465
(843) 971-6053

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Respondents

[Additional Counsel Listed On Inside Cover]

November 25, 2002

BRADFORD P. SIMPSON
D. MICHAEL KELLY
B. RANDALL DONG
SUGGS & KELLY LAWYERS, P.A.
P.O. Box 8113
Columbia, SC 29202-0008
(803) 461-2163

T. ALEXANDER BEARD
BEARD LAW FIRM
1002 Anna Knapp Blvd
Mt. Pleasant, SC 29464
(843) 216-0331

CHARLES L. DIBBLE
DIBBLE LAW OFFICES
P.O. Drawer 1240
Columbia, SC 29202
(803) 254-0307

STEVEN W. HAMM
RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

CHARLES L.A. TERRENI
P.O. Box 11904
Columbia, SC 29211
(803) 771-2611

DANIEL WEBSTER WILLIAMS
BEDINGFIELD & WILLIAMS
P.O. Box 616
Barnwell, SC 29812
(803) 259-2759

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, which does not contain a preemption provision and which expressly saves "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, divests a state court from applying state law to allow an arbitrator to order arbitration to proceed on a class-wide basis where state law allows class arbitrations and the state substantive law underlying the claim expressly reserves the right of injured parties to bring a class action.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 12

I. THE STATE SUPREME COURT APPLIED STATE LAW AS PERMITTED UNDER THE FAA AND THIS COURT'S DECISIONS 13

A. The FAA Expressly Reserves A Role For State Law In The Enforcement Of Arbitration Agreements 13

B. The South Carolina Supreme Court's Application Of State Law Is Not Preempted By The FAA 14

II. PETITIONER'S ALLEGATION OF A "CONFLICT" IS ILLUSORY 18

A. All Of The Federal Cases Cited By Petitioner Rest On An Application Of Federal Law That Is Absent From This Case 18

B. Cases Upholding Class Arbitrations Have Done So On The Basis Of State Law 22

III. THE ARBITRATOR'S DECISION TO PERMIT A CLASS ARBITRATION IS ENTITLED TO SPECIAL DEFERENCE AND IS AN INDEPENDENT GROUND FOR AFFIRMANCE ... 25

A. An Arbitrator's Construction Is Entitled To Substantial Deference 25

B. The Fact That The Class Decision Was Made By The Arbitrator Is An Independent Ground Of Affirmance 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Centennial Ins. Co. v. National Cas. Co., 951 F.2d 107 (6th Cir. 1991) 22

Baesler v. Continental Grain Co., 900 F.2d 1193 (8th Cir. 1990) 22

Blue Cross of California v. Superior Court, 67 Cal. App. 4th 42 (1998) 22, 23

Boynton v. Carswell, 233 S.E.2d 185 (Ga. 1977) 24

Callaway v. Carswell, 242 S.E.2d 103 (Ga. 1978) 24

Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 10, 17, 19

Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771 (7th Cir. 2000) 17

Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987) 22

Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991) 23

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 13

Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001) 19, 20

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 15

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 15

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 26

Glencore, Ltd. v. Schnitzer Steel Prods. Co., 189 F.3d 264 (2d Cir. 1999) 22

Heffner v. Destiny, Inc., 471 S.E.2d 135 (S.C. 1995) .. 15

Hines v. Davidowitz, 312 U.S. 52 (1941) 14

Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) 27, 28

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 23, 24

Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), *rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984) 23

Leonard v. Terminix Int'l Co., No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) 20-21

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) 11, 26, 27, 28

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 16, 17

Med Center Cars, Inc. v. Smith, 727 So. 2d 9 (Ala. 1998) 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 26

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 24

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360 (S.C. 2001) 9, 15, 20

Myrtle Beach Lumber Co. v. Willoughby, 274 S.E.2d 423 (S.C. 1981) 9, 16

New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988) 19, 23

Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989) 22

Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410 (11th Cir. 1990) 26-27

Southland Corp. v. Keating, 465 U.S. 1 (1984) 14

Stein v. Geonerco, Inc., 17 P.3d 1266 (Wash. Ct. App. 2001) 20

Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289 (9th Cir. 1987) 27

Tilley v. Pacesetter Corp., 508 S.E.2d 16 (S.C. 1998) . 3, 4

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 26

Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) ..... *passim*

Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984) 22

W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) 26

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*:

§ 2, 9 U.S.C. § 2 ..... 13, 15, 18

§ 3, 9 U.S.C. § 3 14

§ 4, 9 U.S.C. § 4 ..... 10, 14, 17

§ 10, 9 U.S.C. § 10 ..... 11, 28

Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* 23

S.C. Code Ann. § 37-10-102 2

Fed. R. Civ. P.:

Rule 42(a) 20, 22

Rule 81(a)(3) 19, 22

LEGISLATIVE MATERIALS

S. Rep. No. 68-536 (1924) 13

OTHER MATERIALS

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 18

IN THE

Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This case involves Petitioner Green Tree's pervasive and knowing violation of the South Carolina Consumer Protection Code ("Consumer Code") in more than 3,700 real estate secured loan transactions made by Green Tree in South Carolina. As found by the Arbitrator – chosen pursuant to the process devised by Green Tree itself in adhesion contracts forced upon consumers – Green Tree "has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement." Pet. App. 91a. After the Arbitrator certified a class of similarly situated consumers and then awarded damages for Green

Tree's knowing and repeated violations of South Carolina's Code, Green Tree fought enforcement of the arbitral award in South Carolina's state courts, which uniformly upheld the Arbitrator's decision to proceed on a class-wide basis.

In this Court, Green Tree broadly asserts "conflicts" with a variety of federal and state courts over whether a class arbitration may be permitted to proceed. In framing that issue, Green Tree ignores that the Federal Arbitration Act ("FAA") contains no preemption provision and expressly reserves a role for state law. Moreover, Green Tree misreads the cases as supposedly in conflict. The federal cases that it cites hold that the Federal Rules of Civil Procedure do not authorize *federal* courts to order class arbitrations, but those cases do not address (or, indeed, expressly reserve) the situation present here: a state court applying state law to uphold a state arbitration that construes the contract between the parties to permit the arbitration to proceed on a class-wide basis. Although several States have construed their own state law not to permit class arbitrations, such differences are irrelevant to this Court's normal standards for granting certiorari – whether courts are in conflict on the *same* law.

STATEMENT

1.a. In 1982, the South Carolina General Assembly ("General Assembly") amended the Consumer Code by eliminating caps on the interest rates that lenders could charge for consumer credit and authorizing certain fees for lenders. To protect consumers against predatory lending practices in real estate secured transactions, the General Assembly enacted an additional requirement mandating that lenders advise consumers of their right to obtain their own attorneys and insurance agents and requiring lenders to record on the first page of the credit application the consumer's preference for those representatives who would provide professional services at the closing of real estate transactions. S.C. Code Ann. § 37-10-102 (the "Preference Statute"). The purpose behind the law was to prevent salesmen who sell home improvements, mobile homes, and other

home appurtenances from locking consumers into usurious interest rates for such items and securing those loans with the consumer's real estate without the benefit of an attorney and insurance agent to give advice. Under early versions of the law, if a lender violated the Preference Statute, consumers could obtain forfeiture by a creditor of the total amount of the loan finance charge, repayment of double the amount of interest collected, and costs of the action and repayment of the balance of the loan without any loan finance charges. *See Tilley v. Pacesetter Corp.*, 508 S.E.2d 16 (S.C. 1998). The Preference Statute at that time did not alter in any way the right of consumers to proceed against violators of the statute on a class-wide basis by filing suit in state court.

In 1997, the General Assembly amended the Preference Statute and altered the penalty for violations from a calculation based upon specific dollar amounts of the transaction to a penalty range limited to $1,500 to $7,500. Given Green Tree's pervasive and repeated violations of the Preference Statute, the 1997 amendments effectively reduced the dollar value of the penalty that could be assessed against Green Tree by more than $150 million in the case involving the *Lackey* Respondents alone. In addition, the General Assembly changed the statute of limitations and precluded future class actions for violations of the Preference Statute. The same amendment, however, directed that all Preference Statute cases filed as class actions prior to May 2, 1997, "may proceed" subject to application of the new penalty range.

In *Tilley*, the South Carolina Supreme Court held that the Preference Statute could be enforced through a class action for violations arising before the 1997 amendment in a case involving a door-to-door seller of aluminum windows, awnings, and doors who secured the transactions with mortgages on the consumers' residences. The seller-creditor failed to ascertain the consumers' preferences of attorney and insurance agent and failed to use attorneys in the transactions. The state supreme court emphasized that

the Preference Statute must be liberally construed in compliance with provisions of the Consumer Code. 508 S.E.2d at 19.

b. The two cases at issue here involve two types of transactions: home-improvement transactions secured by real estate and manufactured-housing transactions secured by real estate.

The Bazzle transaction is typical of a home-improvement transaction. A home-improvement contractor offering financing through Green Tree, a subprime lender, would solicit customers door-to-door, offering home-improvement services. The Green Tree dealer would advise the consumer that home improvements could be financed, and the consumer would complete a credit application to be submitted to Green Tree. Pet. App. 61a. The terms of the credit were not disclosed. If the consumer agreed to purchase home improvements, the Green Tree dealer or one of its employees would return to the consumer's home with the transaction documents. All of the transaction documents were standard preprinted form contracts of adhesion prepared by Green Tree. All of the terms of financing were set by Green Tree, including the rate of interest. *Id.* at 61a-62a. The documents, if explained at all, were not prepared or reviewed by an attorney. The consumers were not given a Preference Statute disclosure. *Id.* at 61a. Many consumers did not understand that they were securing the credit transaction with a mortgage on their home. Generally, the consumers would learn later of the mortgage when they attempted to sell or refinance their home. Only one person would be available to witness the signing of the mortgage at the closing. No attorney for the consumer was involved in the transaction. *Id.* at 62a.

Green Tree's manufactured-housing transactions would proceed in a similar fashion. The consumers would enter into preprinted consumer installment contracts and security agreements with Green Tree to purchase a mobile home. *Id.* at 87a-88a. Green Tree's dealer would obtain a credit application for Green Tree from the consumer. The

credit application did not include the required Preference Statute disclosure. If Green Tree elected to extend credit, it would set the terms of the credit, prepare all the necessary documents for closing, and transmit the documents to its dealer. The documents included a mortgage prepared by Green Tree. The dealer would have the consumer execute the documents without explanation. The mortgage, on its face, directed the local recording office to return it directly to Green Tree. No attorney was involved in the transaction. *Id.* at 88a.

c. The documents used in these transactions are contracts of adhesion prepared by Green Tree. Both cases involved preprinted form consumer Retail Installment Contracts and Security Agreements ("RICSA") and Mortgages. The adhesion RICSA drafted by Green Tree provides, in pertinent part: "You agree this contract will be governed by the law of the State of South Carolina." R. App. 2162. The mortgage prepared by Green Tree provides: "The state and local laws applicable to this Mortgage shall be the laws of the jurisdiction in which the Property is located." *Id.* at 3045.

The RICSA in both classes contained an arbitration provision that reads in part as follows:

> The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract.

Pet. App. 110a. Neither the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions.

2.a. In March 1997, Lynn and Burt Bazzle commenced an action against Green Tree for violating the Preference Statute involving home-improvement transactions secured by real estate. *Id.* at 56a. Shortly after the case was filed,

Green Tree moved to compel arbitration under the terms of its adhesion contract. *Id.* In late 1997, the South Carolina trial court granted the Bazzles' motion for class certification and then granted Green Tree's motion to compel arbitration. *Id.* at 56a-57a. Both the South Carolina court of appeals and supreme court denied Green Tree's attempts to obtain appellate review of the trial court's rulings on the ground that such an appeal was interlocutory. *Id.* at 57a-58a. The case was then referred to the appointed Arbitrator. *Id.* at 58a. While in arbitration, Green Tree moved to dismiss or in the alternative to decertify all or a portion of the class, *id.* at 29a, placing squarely before the Arbitrator the issue of class arbitration. The Arbitrator denied the motion. *Id.*

After conducting a hearing, the Arbitrator – at that time a sitting retired state circuit court judge – issued his written Award. *Id.* at 55a-81a. The Arbitrator found Green Tree liable for violating the Preference Statute and awarded relief on a class-wide basis. The Arbitrator found that Green Tree submitted virtually no evidence of compliance with the Preference Statute enacted years earlier. The Arbitrator noted:

> Green Tree offered no evidence of any nature that after it was sued by [other consumers] in 1994 that it attempted to comply with the preference statute . . . .
>
> . . . After five suits, including [the *Bazzle* suit], having been brought against Green Tree for failing to comply with the preference statute, it still continued to refuse to take any action or to adhere to the statute's requirements. . . . Thus, based on the testimony and the evidence of record, I find that Green Tree simply chose to totally ignore the law despite learning of the requirement. As a result of its behavior, Green Tree's conduct rises to a shocking level of callous and reckless indifference to the rights of South Carolina residents.

Id. at 67a-68a.

The Arbitrator also heard evidence about other actions initiated against Green Tree for violating the Preference Statute and other legal actions brought against other lenders. That evidence provided a range of the penalties imposed in other cases that the Arbitrator used in fashioning a damages award. In one such case, the Arbitrator drew attention to the testimony of Green Tree's in-house counsel who "unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent." *Id.* at 63a. Green Tree resolved that case by paying the injured party $50,000 and satisfying the original note and mortgage in the amount of $15,000. R. App. 3173.

The Arbitrator held that one such case clearly established that, in late 1994, Green Tree had actual notice of the Preference Statute, and that the case demonstrated Green Tree's willful non-compliance with the consumer protection statute. Pet. App. 63a-64a. The Arbitrator found that, "[a]fter learning of the preference statute, Green Tree did nothing. It failed to provide the notice. It failed to use attorneys for the transactions." *Id.* at 68a. The Arbitrator concluded that testimony and other evidence clearly showed an ongoing pattern and practice that began as a careless or negligent attitude and graduated into a willful non-compliance and disregard for South Carolina law. *Id.* at 69a.

Based on these determinations and consideration of the available penalty of $1,500 to $7,500, as well as the record before him, the Arbitrator awarded $5,000 to aggrieved consumers in 1,323 home-improvement transactions that occurred prior to the time Green Tree had notice of its non-compliance. For the remaining 576 home-improvement transactions that occurred after Green Tree had actual notice of its obligation under the Preference Statute and still did nothing to comply, the Arbitrator awarded $7,500 per transaction.

In accordance with applicable state law, the Bazzles filed a motion to confirm the award in South Carolina trial court,

and Green Tree filed a motion to remand the award for amendment and clarification. On September 15, 2000, the lower court denied Green Tree's motion and confirmed the award of the Arbitrator, determining that the Arbitrator acted within his authority to hold Green Tree liable on a class-wide basis. Green Tree again appealed, and the South Carolina Supreme Court assumed jurisdiction to hear the appeal in consolidation with the *Lackey* case.

b. The *Lackey* case was filed as a class action in state court in May 1996. Those Respondents alleged violations of the Preference Statute by Green Tree in manufactured-home and home-improvement transactions secured by South Carolina real estate (with the home-improvement transactions subsequently being transferred and consolidated with the *Bazzle* matter). Pet. App. 87a. Green Tree filed an answer and the *Lackey* plaintiffs moved for class certification. Green Tree then moved to stay and compel arbitration. The lower court denied Green Tree's motion to compel and ruled the arbitration clause unconscionable. Green Tree appealed and the South Carolina court of appeals reversed, finding that the contract was a contract of adhesion but not unconscionable and directing that the case be compelled to arbitration.

The Arbitrator held a hearing on whether the Green Tree arbitration agreement, ruled to be a contract of adhesion, prevented class arbitration. After the hearing, in which Green Tree participated, the Arbitrator determined that the arbitration clause drafted by Green Tree did not preclude class arbitration. The Arbitrator then held a second hearing on class certification and granted class certification. Green Tree filed several actions in state and federal courts contesting the decision of the Arbitrator. Each court refused to grant the relief sought by Green Tree, ruling that it had no jurisdiction to intervene in an ongoing arbitration proceeding.

After conducting a hearing on the merits, at which Green Tree did not submit any evidence demonstrating compliance with the Preference Statute, the Arbitrator noted that

Green Tree admitted "that it did not comply with the attorney and insurance agent preference statute: It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to September 1995, the attorney and insurance agent preference requirement as impounded in *Tilley*, was not complied with." Pet. App. 67a n.4. In addition, Green Tree did not seek a legal opinion from counsel regarding all South Carolina statutes applicable to its real estate secured transactions in South Carolina. *Id.* at 98a.

The state trial court then denied Green Tree's motion to remand and vacate the final order of the Arbitrator, and confirmed Respondents' motion to confirm the award. On appeal by Green Tree, the state supreme court accepted jurisdiction and consolidated the *Bazzle* and *Lackey* cases.

3. The South Carolina Supreme Court unanimously affirmed the trial court's judgment to uphold the Arbitrator's determination that the arbitration clause drafted by Green Tree did not preclude class arbitration and that both the *Bazzle* and the *Lackey* cases could proceed before the Arbitrator as class actions. The court explicitly stated that its decision was consistent with long-standing state and federal authority requiring the resolution of any doubts concerning the scope of arbitrable issues in favor of arbitration. Pet. App. 17a.

The court explained that it had already construed Green Tree's arbitration clause in a prior case, in which it had held that "'general principles of state law apply to arbitration clauses governed by the FAA.'" *Id.* (quoting *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001)). The court then examined the specific language of the arbitration provision in Green Tree's adhesion contract and construed the provision under long-standing state law contract construction principles, emphasizing that any ambiguity in the contract "should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id.* (citing *Myrtle Beach Lumber Co. v. Willoughby*, 274 S.E.2d 423 (S.C. 1981)). As the court reasoned, "[a]fter all, the drafting

party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Id.*

The court analyzed whether, notwithstanding state law permitting class arbitrations, federal law compelled the opposite result. The court below observed that certain federal courts had followed *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which the court described as articulating the "federal approach," Pet. App. 12a n.11, to deny class arbitration in cases brought in federal court under FAA § 4. The state supreme court reasoned that it was not obliged to follow *Champ* because that case rested on an application of § 4, which by its plain terms involves a petition to a "*United States district court*." *Id.* at 20a. For that reason, the court determined that the application of FAA § 4 to actions brought to enforce arbitrations in state court was "debatable." *Id.*; *see also id.* (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989)).

The court then emphasized that its decision rested on independent state law grounds:

> In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions. No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so.

Id. at 20a-21a (footnote, internal quotation marks omitted).

After setting out those principles of state contract law, the state supreme court determined as a preliminary matter that Green Tree's clause was silent regarding class arbitration and that its omission should be construed against it as the drafting party. *Id.* The court specifically rejected Green Tree's argument that the singular language of the clause stating claims relating to "this contract" precludes class arbitration. *Id.* at 19a. The court found that the language did not limit the arbitration to non-class arbitration but rather, at best, created an ambiguity, which under state law should be construed against Green Tree as the drafting party. *Id.* at 21a. The court then announced that, under South Carolina law, "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.

The court noted that such a rule had particular force when viewed from the perspective of a court's review of an arbitrator's decision. The court read this Court's decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001) (per curiam), to announce a highly deferential rule for the review of an arbitrator's decisions: "If an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision." Pet. App. 23a. Given the "narrow standards of review in both cases," the court upheld the Arbitrator's awards in both the *Bazzle* and *Lackey* cases. *Id.* at 23a-24a (noting that "Green Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the first three justifications listed in section 10 of the FAA"). The court then noted that the only other justification in FAA § 10 for overturning an arbitrator's award is "manifest disregard of the law," which Green Tree had conceded only occurred "when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case." *Id.* at 24a (citing Green Tree brief

and state case). Accordingly, because the Green Tree arbitration clause was silent and because the availability of class arbitrations under that contract language had not been settled at the time of the *Bazzle* and *Lackey* arbitrations, "the arbitrator did not act in manifest disregard of the law by permitting [the class arbitration] to proceed." *Id.*[1]

REASONS FOR DENYING THE PETITION

The state supreme court's decision to uphold an arbitrator's decision to proceed with a class arbitration is consistent with this Court's decisions holding that the FAA does not preempt state law that is not in conflict with a federal standard. Neither the FAA nor the arbitration agreement speaks to the question of class arbitrations, so no such conflict can exist. Moreover, the assertions by Petitioner of a "deep and mature" conflict among various federal and state courts fundamentally misunderstands the legal basis on which those courts decided whether a class arbitration may proceed. All of the federal court decisions cited by Petitioner that deny class arbitration or class consolidation do so as a construction of the Federal Rules of Civil Procedure. But this Court has expressly held that those rules have no application in state courts, which are free to adopt their own procedural rules. Some States, like South Carolina, have developed their own state law to allow class arbitrations, and other States have not. Absent an intent by Congress for the FAA to occupy the entire field of arbitration procedures – which this Court has held Congress had no intent to do – the different approaches by the several States are part and parcel of our system of federalism.

---

[1] The court further noted that a 1997 amendment by the General Assembly to the penalty provision of the Preference Statute "provided specifically that 'any actions filed as class actions, without regard to certification, prior to May 2, 1997, may proceed, but with remedies pursuant to section 37-10-105 as amended.'" Pet. App. 24a n.23. The court concluded that the Arbitrator did not act in manifest disregard of state law in awarding the penalties provided in the 1997 amendments to the Preference Statute.

Because the state supreme court explicitly applied South Carolina law and because the underlying claim rested on a state statute that authorized class actions to enforce its terms, there is no basis for asserting that the decision below raises any question on which courts disagree or that otherwise warrants this Court's review. In addition, an independent ground for affirmance is that the *Arbitrator* made the decision to proceed on a class-wide basis, and Green Tree cannot meet its heavy burden under this Court's decisions to demonstrate why a court should disregard its highly deferential standard of review of an arbitrator's decision.

I. THE STATE SUPREME COURT APPLIED STATE LAW AS PERMITTED UNDER THE FAA AND THIS COURT'S DECISIONS

A. The FAA Expressly Reserves A Role For State Law In The Enforcement Of Arbitration Agreements

The Federal Arbitration Act was enacted to abrogate the general common law rule against the enforcement of arbitration agreements. *See* S. Rep. No. 68-536, at 2-3 (1924). Under the FAA, "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, that language reserves a role for States to play in the enforcement of arbitration agreements. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

The respect for state rules by Congress in its enactment of the FAA is reflected throughout the Act. Specifically, Congress provided for enforcement of arbitration under the FAA in the federal courts, over which it exercises supervisory power, but was completely silent about the procedures

that state courts should follow in determining how to enforce state arbitrations. Section 3 provides that, "[i]f any suit or proceeding be brought *in any of the courts of the United States* upon any issue referable to arbitration," the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Similarly, Section 4 confers a right on "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court" for appropriate relief. *Id.* § 4.

The Act imposes no similar procedural requirements on state courts, and this Court has expressly disavowed holding that FAA §§ 3 and 4, "which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." *Volt*, 489 U.S. at 477 n.6 (citations omitted); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) ("[W]e do not hold that §§ 3 and 4 of the [FAA] apply to proceedings in state courts."). Accordingly, this Court has explained that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules." *Volt*, 489 U.S. at 476. States are thus free to determine whether, under state law, arbitrations may proceed on a class-wide basis.

B. The South Carolina Supreme Court's Application Of State Law Is Not Preempted By The FAA

1. Well-established preemption doctrine confirms that Congress had no intent to divest the States of authority to permit arbitrations to proceed on a class-wide basis. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Thus, a court analyzes a claim of preemption of state law by the FAA under settled conflict preemption principles – "that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See*

also Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Under this standard, there is no conflict with any principle announced in federal law. The FAA is completely silent as to whether an arbitrator may order a class arbitration and whether a state court asked to enforce such an arbitral award may do so. Notwithstanding Petitioner's hyperbolic rhetoric about the South Carolina approach being "hostil[e]" to arbitrations, Pet. 12, in fact the State's approach facilitates the purposes of the FAA by empowering consumers collectively to resolve their disputes in arbitration, rather than through litigation, particularly where the likely individual recovery is small and the claimant's costs of pursuing a remedy great.

2. The state supreme court fully appreciated and applied those preemption principles in determining that, where an arbitration agreement is silent on the subject of class arbitrations, a state court may uphold a decision by an arbitrator to conduct a class arbitration under South Carolina law. The court below rested its decision to allow class arbitrations where the agreement is silent on several important principles of South Carolina law. As the court stressed, it "can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent." Pet. App. 20a.

First, the court noted that South Carolina law "favors arbitration of disputes." *Id.* at 17a (citing *Heffner v. Destiny, Inc.*, 471 S.E.2d 135 (S.C. 1995)). That justification in itself is completely consistent with the underlying policy of the FAA to enforce arbitration clauses. *See* 9 U.S.C. § 2. The court further explained that its decisions had held that "'general principles of state law apply to arbitration clauses governed by the FAA.'" Pet. App. 17a (quoting *Munoz*, 542 S.E.2d at 364). That state law preference led the court to stress that allowing arbitrations to proceed on a class-wide basis fully comported with the intent of the drafting party

to seek its favored arbitration procedures for resolving any dispute with the non-drafting parties. *Id.* at 17a, 22a n.21.

Second, the state supreme court properly invoked state decisional law to hold that, when a contract contains an ambiguity, it "should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id.* at 17a (citing *Myrtle Beach Lumber*). As the court noted, this state law principle of contract construction flows from the notion that "the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Id.* Indeed, that principle is so generally applicable in the common law of contract that the state supreme court invoked this Court's decision in a closely analogous case for the same principle. *See id.* at 18a (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), for the proposition that the common law of contract required "construing ambiguous language against the drafting party"). For that reason, it was reasonable for the court below to interpret ambiguous silence about class arbitrations in the agreement against Green Tree, which drafted the contract. *Id.* at 17a.

Third, the court employed state law to construe other language of the arbitration clause drafted by Petitioner in a way that does not foreclose class arbitrations. Green Tree had argued that the phrase "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*" must be construed to prohibit class arbitration in South Carolina. *See id.* at 19a. The state supreme court rejected that reading of the contract, holding that under state law, "[a]t best, [that language] creates an ambiguity" that must be "construed against the drafting party, Green Tree." *Id.* As this Court has stressed, the state supreme court's "interpretation of private contracts is ordinarily a question of state law, which

this Court does not sit to review." *Mastrobuono*, 514 U.S. at 60 n.4 (quoting *Volt*, 489 U.S. at 474).[2]

The state supreme court's treatment of class arbitrations thus follows this Court's analysis in *Mastrobuono*. There, the Court held that, where an arbitration agreement was silent on whether an arbitrator could award punitive damages, the arbitrator could award such damages if permitted under state law. 514 U.S. at 62-63. In holding the agreement ambiguous, this Court emphasized that "a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62. "The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

3. The court below also correctly rejected as inapplicable the analysis of federal court decisions under FAA § 4. First, the court reasonably questioned whether Section 4 even applies to state court decisions regarding arbitrations, in light of this Court's statements to that same effect. *See* Pet. App. 20a (citing *Volt*). Second, the court noted that the *Champ* decision had analogized class arbitration to the consolidation of arbitration, holding that the same rule should apply for both procedures. *Id.* at 21a. Because federal cases had held that consolidated arbitrations could not be permitted under the Federal Rules of Civil Procedure, the court below reasoned that *Champ*'s approach did not foreclose class arbitration in a State that *permitted* consolidation of arbitration, such as South Carolina. *Id.* Indeed, a more recent Seventh Circuit decision recognizes that, where the arbitration clause is ambiguous, it may be construed against the drafter to permit consolidated arbitrations. *See Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 776 (7th Cir. 2000) (noting that problems with separate arbitrations "are avoided by inter-

[2] The contract also provides for arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract," Pet. App. 110a, language that is sufficiently ambiguous to permit an arbitrator to construe it as conferring authority to order the arbitration to proceed on a class-wide basis.

preting the contract to allow [multiple parties] to demand a single arbitration, provided there is a single dispute").

Finally, and most importantly, the court below appropriately stressed that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. In making that final point, the state supreme court explained its decision in terms captured by FAA § 2, the "grounds as exist at law or in equity" for revocation of a contract. The court made quite clear that enforcing an adhesion contract in these circumstances would be unfair – where "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Id.*; *see also id.* at 22a n.21. That invocation of state law is perfectly consistent with the FAA and this Court's decisions construing it.

II. PETITIONER'S ALLEGATION OF A "CONFLICT" IS ILLUSORY

A. All Of The Federal Cases Cited By Petitioner Rest On An Application Of Federal Law That Is Absent From This Case

In basing its decision solely on South Carolina law, the state supreme court did not bring itself into conflict with those federal courts that have construed the Federal Rules of Civil Procedure to prohibit class arbitration. The fact that the federal rules do not permit federal courts to compel class arbitration does not mean that state courts may not construe state law to permit an arbitrator to proceed with a class arbitration under a state law that expressly contemplates class relief. It is axiomatic that there can be no conflict warranting this Court's review unless the courts are in disagreement about the same rules. *See generally* Robert L. Stern et al., *Supreme Court Practice* 456 (8th ed. 2002). Here, Green Tree misunderstands the different legal bases on which federal and state courts have determined whether a class arbitration may proceed.

1. The federal cases cited by Petitioner are readily distinguishable. In *Champ v. Siegel Trading Co.*, the intervenors asserted that Federal Rule of Civil Procedure 81(a)(3) should be read to authorize district courts "to order these individual arbitration claims to proceed on a class basis." 55 F.3d at 274. In rejecting that contention, the Seventh Circuit squarely based its decision on federal law, noting at the outset that its holding was limited: "We . . . adopt the rationale of several other circuits and hold that section 4 of the FAA forbids *federal* judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275 (emphasis added). The court next emphasized that Rule 81(a)(3) "only applies to *judicial* proceedings under the FAA," *id.* at 276, and thus served as no bar to a conclusion by an arbitrator to proceed on a class-wide basis. The Seventh Circuit then explained that it was following the lead of other circuits that had rejected the use of the Federal Rules of Civil Procedure to authorize federal district courts to order consolidation of individual arbitrations. *Id.* at 274-75. As the court below noted in distinguishing *Champ*, South Carolina law is precisely the opposite of the federal rules: to *allow* consolidation. Pet. App. 21a.

Finally, while expressing "doubts" about the argument, the Seventh Circuit itself recognized that a different rule could apply under a State's law concerning an arbitration implicated by the FAA. The court specifically noted that "[t]he intervenors do not argue that Illinois' arbitration law authorizes class arbitration, so we need not determine whether we would follow the First Circuit's holding" in *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988), which applied a state law authorizing consolidated arbitration. 55 F.3d at 275 n.2.

Nor is *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001), in conflict with the decision below. In that case, the Eighth Circuit applied circuit precedent to hold that the federal district court could not order class arbitration. *Id.* at 728-29. That court expressly

reserved the question decided by the court below, noting that "[t]he construction of an agreement to arbitrate is governed by the FAA *unless the agreement expressly provides that state law should govern.*" *Id.* at 729 n.9 (emphasis added) (noting that "there is no such express provision in the arbitration clauses"). As the South Carolina Supreme Court noted, it had earlier construed the very same arbitration clause and had applied South Carolina law in doing so. *See* Pet. App. 17a (discussing *Munoz*).

Thus, the only two federal court of appeals decisions that directly address the applicability of class arbitrations specifically leave open the question decided by the state supreme court: whether a state law permits a class arbitration to proceed. That, in turn, was the very basis on which the court below decided this case. *See id.* at 22a-23a.

2. For that reason as well, the state cases cited by Green Tree as supposedly conflicting come to the unremarkable and ultimately irrelevant conclusion that their own state law does not permit class arbitrations. In *Stein v. Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001), for example, the Washington Court of Appeals noted that the party seeking class arbitrations had "fail[ed] to cite relevant statutory provisions that conflict with arbitration of his claims." *Id.* at 1270.

Similarly, the Alabama decision cited by Green Tree is inapposite. In *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), the Alabama Supreme Court concluded that Alabama state procedural law should follow federal decisions construing the Federal Rules of Civil Procedure. *See id.* at 20 & n.4 (noting that federal decisions "bar[ring] district courts from applying Rule 42(a), F.R.Civ.P., to require consolidated arbitration" are "persuasive authority in our state courts"). A recent decision of the Alabama Supreme Court – decided prior to Green Tree filing its petition for a writ of certiorari, however – casts substantial doubt on whether Alabama law in fact is as hostile to class arbitrations as Green Tree suggests. In *Leonard*

v. Terminix International Co., No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) (per curiam), the Alabama Supreme Court decided a case much more closely analogous to the decision below, holding that "the preclusion of eligibility for class-action treatment by inserting a provision requiring arbitration . . . lead[s] us to conclude that Terminix has extracted unreasonably favorable and patently unfair terms in its contract of adhesion." *Id.* at *8. Thus, applying "Alabama law relating to unconscionability," the Alabama Supreme Court held that arbitration clauses that denied class treatment could, in certain circumstances, be unenforceable. *Id.*[3]

Those state decisions rejecting class arbitrations, therefore, do so on the basis of their own State's law and not because they understand federal law to prohibit or preempt States from upholding an arbitrator's decision to proceed on a class-wide basis. Those decisions thus do not conflict in any way with the court's ruling below.

3. In an effort to make its assertion of a conflict appear more substantial, Green Tree cites numerous federal court of appeals decisions rejecting an argument that the Federal Rules of Civil Procedure – which apply to federal and not to state judicial proceedings – do not empower district courts to order *consolidation* of proceedings. In the proceedings below, Respondents did not make, and the South Carolina Supreme Court had no occasion to address, that argument – nor could they. Because this case proceeded entirely in South Carolina state court, there was no reason for the state courts to consider whether the Federal Rules of Civil Procedure condone or condemn consolidations. Accordingly, the federal decisions cited by Green Tree on consolidation

---

[3] Green Tree subsequently changed its form contracts to include an express prohibition on class arbitrations: "Borrower agrees that Borrower shall not have the right to participate as a representative or a member of any class of claimants pertaining to any claim arising from or relating to this Agreement." *See* Respondents' Reply Br. to Amici Curiae, Exh. A (S.C. filed Aug. 28, 2001). Respondents are unaware of any decision yet construing the legality of that provision.

of arbitration under the federal rules simply have no bearing on this case.[4]

Indeed, those cases either do not address or expressly reserve the issue in this case: whether, under state law, a state court may enforce an arbitral award in which the arbitrator construed the arbitration agreement to permit class arbitration. *See, e.g., Baesler*, 900 F.2d at 1195 (noting that party seeking consolidation "makes no contention that North Dakota law contains such a provision" allowing consolidation). There is no basis, therefore, for Petitioner's suggestion that these federal cases support an assertion of a conflict with the state supreme court below.

B. Cases Upholding Class Arbitrations Have Done So On The Basis Of State Law

1. Similarly, in those few courts to have considered whether their State's law permits class arbitrations, the decisions allowing such arbitrations to proceed have done so based on state law. In *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998), the court stressed that,

[4] In any event, they expressly rest on interpretations of federal procedural rules that have no application in state court actions. *See Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 267 (2d Cir. 1999) (holding that Rules 42(a) and 81(a)(3) do not authorize consolidation or joint hearings in arbitration); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194-95 (8th Cir. 1990) (rejecting argument that Rules 42(a) and 81(a)(3) confer "power to order consolidation" on federal district courts); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 n.1 (11th Cir. 1989) (per curiam) ("we reject Protective's argument that district courts have the power to consolidate arbitration proceedings" under Rules 42(a) and 81(a)(3)); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 149-50 (5th Cir. 1987) (following Ninth Circuit in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), to hold that Federal Rules of Civil Procedure do not empower district courts to order consolidation); *Weyerhaeuser*, 743 F.2d at 636-37 (rejecting assertion that federal court "has the power to compel consolidation" under the FAA and Rules 81(a)(3) and 42(a)). In addition, some decisions make clear that they are simply following those cases in construing federal law, but do so without any analysis of the underlying law. *See, e.g., American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 107-08 (6th Cir. 1991) (following *Baesler*).

"[u]nder California decisional authority, classwide arbitration is permissible." *Id.* at 52 (citing cases). The California courts have construed their own code of civil procedure to allow consolidated arbitration proceedings, and the *Blue Cross* court explained that numerous decisions had upheld class arbitration under those state procedural rules because "'the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation.'" *Id.* at 54 (quoting *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

In similar fashion, the First Circuit upheld a consolidation of arbitration because, like the California code of procedure, the Massachusetts arbitration consolidation statute expressly authorized such procedures. *New England Energy*, 855 F.2d at 7.

Green Tree seeks to pique the Court's interest by asserting an inconsistency in the treatment of this issue by the Pennsylvania court and the Third Circuit. *See* Pet. 23, 28. Those cases, however, simply reflect the different substantive and procedural laws being applied. In *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), the Pennsylvania superior court upheld the right of a class arbitration to proceed, but did so because the State's Board of Arbitration of Claims had "adopted the entire Pennsylvania Rules of Civil Procedure to govern its own proceedings." *Id.* at 865. Because the claims being sought by plaintiffs/claimants were equitable in nature, the court determined that those procedural rules – which specifically allowed class actions – presented no conflict with the underlying substantive law on which the claim was based. By contrast, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the Third Circuit considered whether the federal Truth in Lending Act's allowance of class actions operated to alter the agreement of the parties to arbitrate their claims by expanding

the scope of the arbitration agreement to permit class arbitrations. Noting that this was "a question of first impression" and that "[n]o other federal appellate court has squarely addressed" it, the Third Circuit denied the authority of the federal district court to order class arbitration in proceedings brought to vindicate TILA claims. *Id.* at 370. The Third Circuit offered no opinion on whether Pennsylvania state substantive law and procedures were preempted in any way, nor did the Pennsylvania superior court offer any view on the applicability of federal law to arbitrations brought to vindicate federal claims. In any event, if this Court is truly concerned about the different treatment of class arbitration in cases brought in Pennsylvania's federal and state courts, the proper course would be to see whether a Pennsylvania court in the aftermath of *Johnson* follows or brings itself into conflict with the Third Circuit.

2. Green Tree cites only three States (California, Pennsylvania, and South Carolina), therefore, as permitting class arbitrations in certain circumstances,[5] and in those States the courts have done so relying on state rules that are inapplicable in federal courts. Green Tree seeks a federal one-size-fits-all approach that denies those States the right to use their own state law to vindicate state causes of action in state arbitrations. But this Court has stressed emphatically that, "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend the rule of liberal construction set forth in *Moses H. Cone* [*Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)], nor does it offend any other policy embodied in the FAA." *Volt*, 489 U.S. at 476.

---

[5] Georgia also appears to allow class arbitrations for certain challenges to local taxes. *See Boynton v. Carswell*, 233 S.E.2d 185, 187 (Ga. 1977) (noting that "[t]here is no legal or practical reason why this class controversy [involving local tax disputes] could not be settled in a class arbitration"), *overruled on other grounds*, *Callaway v. Carswell*, 242 S.E.2d 103 (Ga. 1978).

III. THE ARBITRATOR'S DECISION TO PERMIT A CLASS ARBITRATION IS ENTITLED TO SPECIAL DEFERENCE AND IS AN INDEPENDENT GROUND FOR AFFIRMANCE

Throughout its submission, Green Tree ignores the substantial effect of one important facet of this case: the *Arbitrator* decided that this case should proceed as a class arbitration. Contrary to its recurrent suggestion, this case was not a situation of the South Carolina courts imposing their views on arbitration, but rather the *Arbitrator* making the decision to proceed with a class arbitration: "I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 84a. Under well-settled law, the Arbitrator's decision is entitled to special deference. Accordingly, this case presents the wrong vehicle for determining whether courts can impose on arbitrators a class action mechanism – here, the Arbitrator made his own independent judgment to construe the contract in that way.[6]

A. An Abitrator's Construction Is Entitled To Substantial Deference

Two Terms ago, this Court made manifestly clear that courts are not to disturb the findings of an arbitrator absent

---

[6] The state supreme court's opinion might be read to leave the impression that the state circuit court's certification of the class in the *Bazzle* case preceded referral to arbitration and therefore compelled the Arbitrator to proceed on that basis. *See* Pet. App. 8a. The Arbitrator, however, was an experienced state judge who made clear in his opinion that he proceeded in arbitration based on a second amended complaint that contained class allegations, *see id.* at 59a, and that Green Tree had ample opportunity to object to inclusion of class members, *id.* at 68a, but chose not to do so. Moreover, the same arbitrator decided both cases, which had identical arbitration clauses, and he had opined on the class issue under the arbitration clause in the *Lackey* case on August 19, 1998 (*see id.* at 84a), long before the *Bazzle* case proceeded to final resolution in arbitration (*see id.* at 58a-59a). Finally at the specific request of Green Tree, all home-improvement transactions contained in the *Lackey* matter were consolidated with the *Bazzle* action. *See id.* at 29a.

extraordinary circumstances. Reiterating its long-standing rule limiting judicial review of arbitral awards, the Court stated that, "if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Garvey*, 532 U.S. at 509 (internal quotation marks omitted). For that reason, even if the court is convinced that the arbitrator committed "serious error," that "does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority." *Id.* at 510.

That deference flows from basic contract principles: by agreeing to submit the construction of their contract to an arbitrator, the parties bargained for the procedures he devised. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Green Tree made this trade – indeed, it affirmatively sought to avoid the court's decision-making process though adhesion contracts. Thus, if this Court were to undo the Arbitrator's procedural and substantive disposition of the dispute, such a decision would unravel the very requirement to arbitrate that Green Tree imposed on Respondents. *See W.R. Grace & Co. v. Local Union* 759, 461 U.S. 757, 764 (1983) ("When the parties include an arbitration clause in their . . . agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator."); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.").[7]

B. The Fact That The Class Decision Was Made By The Arbitrator Is An Independent Ground Of Affirmance

Green Tree has made no effort to demonstrate that the special deference afforded to an arbitrator's decision can be overcome or that a conflict exists over how the state supreme court applied *Garvey* to uphold the arbitral award. Thus, to even reach the question that Green Tree has presented, this Court would first have to ignore its long-standing precedent affording deference to an arbitrator's construction of a contract, hold that the contract must be construed to prohibit class arbitrations, and then determine that the South Carolina courts lacked authority to uphold the arbitral award under state law because the FAA preempts the State's authority to do so.

But there is no basis for this attack: as is well-established, "[a]n arbitrator enjoys wide latitude in conducting an arbitration hearing," and "[a]rbitration proceedings are not constrained by formal rules of procedure or evidence." *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1293 (9th Cir. 1987) ("The scope of review of an arbitrator's decision is extremely narrow."). Moreover, "[t]he arbitrator has great latitude in construing ambiguous language in the contract, and a court must not vacate an arbitration award simply because the court disagrees

---

[7] Moreover, this particular arbitration agreement conferred authority on the Arbitrator to exercise "all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 110a. Reasonably construed, such broad powers encompass the authority to order arbitrations to proceed on a class-wide basis.

with the arbitrator's construction of the contract." *Hoteles Condado Beach*, 763 F.2d at 41.

Here, consistent with that latitude, the Arbitrator read the contract and observed that there was no express provision prohibiting class-wide treatment. He accordingly construed the contract's ambiguity on the issue of class certification against Green Tree, which drafted the contract. Green Tree cannot plausibly show a violation of FAA § 10 to the effect that the result was induced by fraud, corruption, bias, or disregard of the law. *See* 9 U.S.C. § 10; Pet. App. 24a (noting that unresolved issue of state law meant that "arbitrator did not act in manifest disregard of the law by permitting [the class arbitration] to proceed"). Nor can Green Tree show that the Arbitrator refused to hear pertinent evidence or otherwise engaged in misconduct. *See* Pet. App. 23a-24a. Absent such misconduct, there is no basis warranting the extreme remedy of overturning the Arbitrator's decision. *See Garvey*, 532 U.S. at 509.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MARY LEIGH ARNOLD
MARY LEIGH ARNOLD, P.A.
P.O. Box 265
Mt. Pleasant, SC 29465
(843) 971-6053

BRADFORD P. SIMPSON
D. MICHAEL KELLY
B. RANDALL DONG
SUGGS & KELLY LAWYERS, P.A.
P.O. Box 8113
Columbia, SC 29202-0008
(803) 461-2163

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

STEVEN W. HAMM
RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

T. ALEXANDER BEARD
BEARD LAW FIRM
1002 Anna Knapp Blvd
Mt. Pleasant, SC 29464
(843) 216-0331

CHARLES L. DIBBLE
DIBBLE LAW OFFICES
P.O. Drawer 1240
Columbia, SC 29202
(803) 254-0307

CHARLES L.A. TERRENI
P.O. Box 11904
Columbia, SC 29211
(803) 771-2611

DANIEL WEBSTER WILLIAMS
BEDINGFIELD & WILLIAMS
P.O. Box 616
Barnwell, SC 29812
(803) 259-2759

Counsel for Respondents

November 25, 2002

No. 02-634

Supreme Court U.S.
FILED
DEC 10 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF OF PETITIONER

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

December 10, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Baesler v. *Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) 5
Blue Cross of Cal. v. *Superior Court*, 67 Cal. App. 4th 42 (1998) 3, 7
Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 2, 3, 4
Connecticut Gen. Life Ins. Co. v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771 (7th Cir. 2000) 4
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 3, 9
Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) 3, 8, 9
Dominium Austin Partners, LLC v. *Emerson*, 248 F.3d 720 (8th Cir. 2001) 2, 5
E.E.O.C v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 3
First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) 10
Gammaro v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994) 5
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 10
Government of U.K. v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) 3
Howsam v. *Dean Witter Reynolds, Inc.*, No. 01-800 (U.S. Dec. 10, 2002) 3
Leonard v. *Terminix Int'l Co.*, No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) 6
Lopez v. *Home Buyers Warranty Corp.*, 670 So. 2d 35 (Ala. 1995) 6
Mastrobuono v. *Shearson Lehamn Hutton, Inc.*, 514 U.S. 52 (1995) 3, 9, 10

TABLE OF AUTHORITIES – continued

Page

Med Ctr. Cars, Inc. v. *Smith*, 727 So. 2d 9 (Ala. 1998) 6
Munoz v. *Green Tree Fin. Corp.*, 542 S.E.2d 360 (S.C. 2001) 6
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 7, 8
Stein v. *Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001) 6, 7
Tilley v. *Pacesetter Corp.*, 508 S.E.2d 16 (S.C. 1998) 2
Volt Info. Scis., Inc. v. *Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) 2, 8, 9
Woodman of the World Life Ins. Soc'y v. *Harris*, 740 So. 2d 362 (Ala. 1999) 6

STATUTES

9 U.S.C. §§ 1-16 1
§ 9 10
§ 10 10
S.C. Code Ann. § 37-10-102(a) 2

RULES

Fed. R. Civ. P. 23 4
42 4

ARGUMENT

In its petition, Green Tree Financial Corp. ("Green Tree") demonstrated that review by this Court is necessary to resolve an acknowledged and persistent conflict among both state and federal appellate courts on the question whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration. Pet. 3-4, 10-13, 14-23. We further demonstrated that the decision below is an appropriate vehicle for resolving this conflict, because the South Carolina Supreme Court rejected the majority position and adopted the minority view that the FAA does not bar class-action arbitration where the parties' agreement does not provide for class-action arbitration. *Id.* at 23-26. In doing so, the South Carolina Supreme Court contravened numerous decisions of this Court, which provide that the FAA mandates in both federal and state courts that arbitration agreements must be enforced according to the parties' terms and not according to terms imposed by courts implementing their own policy preferences. *Id.* at 5-6, 13, 23-26. Finally, we showed that the question presented is an important and recurring one that would have a profound impact on the proper application of the FAA in both state and federal courts. *Id.* at 13-14, 27-30.

Respondents' Opposition ("Opp.") does not detract from the force of these conclusions. To the contrary, Respondents admit candidly that, at a minimum, the "arbitration agreement" does not "speak[] to the question of class arbitration[]." Opp. 12. Respondents are thus forced to attempt to divert the Court's attention from the imposition of class-action arbitration onto such an agreement by arguing that Green Tree is a bad actor that knowingly violated settled South Carolina law and caused substantial damage to numerous South Carolina residents. *Id.* at 1-9. That argument is baseless.

The purportedly "knowing" violations underlying the arbitral awards in this case occurred years *before* the 1998 decision which resolved whether the insurance and attorney preference notice requirements applied to the circumstances presented here. See Pet. App. 69a, 91a (relying expressly on *Tilley* v. *Pacesetter Corp.*, 508 S.E.2d 16 (S.C. 1998) to conclude that S.C. Code Ann. § 37-10-102(a) had been violated). Further, while Respondents "did not attempt to show actual damages" in the proceedings below, *id.* at 69a, 96a, they now pepper their Opposition with baseless claims that (i) "terms of the credit were not disclosed," Opp. 4, (ii) "consumers did not understand that they were securing the credit transaction with a mortgage on their home," *id.*, and (iii) "[t]he dealer would have the consumer execute the documents without explanation," *id.* at 5. Like much of their Opposition, these accusations are made without record citation and cannot alter the conclusion that this case squarely presents an important and recurring question regarding the proper application of the FAA.

1. First, Respondents' efforts to explain away the deep and mature conflict among the state and federal courts are specious. See Opp. 12, 18-24. According to Respondents, there is no conflict because "the federal court decisions . . . that deny class arbitration or class consolidation do so as a construction of the Federal Rules of Civil Procedure." *Id.* at 12. This is merely wishful thinking. Any fair reading of these opinions reveals that they hold that the FAA prohibits the imposition of class or consolidated arbitration where the arbitration agreement does not provide for such treatment. *E.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); see also Pet. 15-19 (citing cases).[1]

[1] The *Champ* line of cases is based on decisions of this Court which make clear that the FAA requires that arbitration agreements be enforced according to their terms. *See Volt Info. Scis., Inc.* v. *Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-79 (1989); *accord*

Similarly, the cases that adopt the conflicting minority approach, including the decision below, are equally clear in holding that the FAA does not preclude imposition of class or consolidated procedures even where the arbitration agreement does not provide for such procedures. See *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 63 (1998); Pet. App. 19a (rejecting Green Tree's argument that "this Court is obligated to follow *Champ*, as a matter of federal substantive law"). This case squarely raises that acknowledged conflict.

a. In *Champ*, the Seventh Circuit directly rejected the argument "that since an order compelling class arbitration *does not contradict* the terms of the parties' arbitration agreement, it is *in accordance with* those terms." 55 F.3d at 274. It did so, not based upon an analysis of the Federal Rules of Civil Procedure – which the court properly held were irrelevant to the issue, *id.* at 276-77 – but based upon a determination that the FAA, as interpreted by this Court in decisions such as *Volt* and *Dean Witter*, precluded that result, *id.* at 274-75. In particular, the *Champ* court concluded that the "chief concern under the FAA is to enforce the parties' arbitration as they wrote it, '*despite* possible inefficiencies created by such enforcement.'" *Id.* (quoting *Government of U.K.* v. *Boeing Corp.*, 998 F.2d 68, 72 (2d Cir. 1993)).[2]

E.E.O.C v. *Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono* v. *Shearson Lehamn Hutton, Inc.*, 514 U.S. 52, 54 (1995); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985); *cf. Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800, slip op. at 3 (U.S. Dec. 10, 2002) ("'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'"); *id.* slip op. at 1 (Thomas, J., concurring in judgment) (noting *Volt* "held that under the [FAA] courts must enforce private agreements to arbitrate . . . in accordance with their terms").

[2] The cases regarding consolidated arbitration, on which *Champ* relied, employ the same analysis. Pet. 16-17 & n.3 (citing cases). For example, in *United Kingdom*, 998 F.2d at 71, the Second Circuit "h[e]ld that the FAA does not authorize consolidation of arbitration proceedings unless doing so would be 'in accordance with the terms of the agreement.'"

Thus, Respondents are wrong in suggesting that *Champ* does not conflict with the decision below because the Federal Rules of Civil Procedure do not authorize consolidation, whereas "South Carolina law is precisely the opposite of the federal rules: to *allow* consolidation." Opp. 19. The Federal Rules of Civil Procedure authorize both "consolidation," Fed. R. Civ. P. 42, and class actions, *id.* 23, but the *Champ* court squarely held that they could not be used to impose class-action arbitration on a "silent" agreement because the FAA "requires that we enforce an arbitration agreement according to its terms." 55 F.3d at 276. Indeed, Respondents nowhere mention, let alone dispute, Green Tree's showing that "the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court." Pet. 29 & n.11 (citing cases); *id.* at 5 & n.1.

In stark contrast, the decision below held that class arbitration could be imposed "without any contractual . . . directive to do so" "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 21a, 22a. The conflict between that holding and the majority position reflected in *Champ* is plain, direct and unassailable.[3] Indeed, the court below, when it rejected the *Champ* line of cases, properly understood that *Champ* turned on the requirements of the FAA, *id.* at 12a-13a, 19a-21a, and not, as Respondents suggest, upon "a construction of the Federal Rules of Civil Procedure." Opp. at 12.

Respondents' effort to reconcile the decision below and the Eighth Circuit's decision in *Dominium Austin Partners* is equally meritless. Opp. 19-20. First, contrary to

[3] The Seventh Circuit has since reiterated that the parties' intent is the determinative question under the FAA. *Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (2000) (court "cannot consolidate, transfer, etc. arbitration proceedings in defiance of the parties' wishes or contractual undertakings"; "the court has no power to order such consolidation if the parties' contract does not authorize it").

Respondents' overarching argument, the *Dominium Austin Partners*' decision nowhere mentions, let alone relies upon, the Federal Rules of Civil Procedure. Instead, the Eighth Circuit held that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." 248 F.3d at 728. Respondents acknowledge that the Eighth Circuit relied upon "circuit precedent," Opp. 19, but ignore that this "circuit precedent" held that the FAA precludes imposition of consolidated arbitration unless the arbitration agreement provides for it. See *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); see also *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (applying *Baesler* to deny request for class arbitration), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994). These holdings directly conflict with the decision below that the FAA permits "'intrusion upon the contractual aspects of the relationship'" "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 21a, 22a.

Nor can *Dominium Austin Partners* be distinguished, as Respondents argue, based on the Eighth Circuit's statement that "'[t]he construction of an agreement to arbitrate is governed by the FAA *unless the agreement expressly provides that state law should govern*.'" Opp. 20 (quoting *Dominium*, 248 F.3d at 729 n.9). The arbitration agreement in this case provides that it "shall be governed by the Federal Arbitration Act," Pet. App. 110a, and the court below squarely held that the arbitration agreement is "governed by the FAA," *id.* at 11a. Although Respondents note that the court below "earlier construed the very same arbitration agreement," Opp. 20, they omit that the South Carolina Supreme Court's prior decision held that (i) "Green Tree's arbitration clause was governed by the FAA," Pet. App. 11a n.9, and (ii) as a result, application of the state's Arbitration Act and provisions of its Consumer Protection Code to the

parties' agreement was preempted by the FAA. See *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001).

Respondents' attempt to reconcile the decision below with *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998), suffers from the same analytical flaws. In *Med Center*, the Alabama Supreme Court acknowledged the applicability and preemptive force of the FAA, *id.* at 12-13, quoted *Champ*'s analysis of the FAA, *id.* at 20, and expressly adopted *Champ* and the cases on which that court relied, *id.* at 20 & n.4. Respondents argue, however, that Alabama adopted the *Champ* line of decisions as a matter of state policy, not as a matter of federal command. But the Alabama Supreme Court has made clear both before *Med Center* and after that, "[u]nder Alabama law, the specific enforcement of a predispute arbitration agreement violates both our statutory law and public policy, *unless federal law preempts state law*." *Lopez* v. *Home Buyers Warranty Corp.*, 670 So. 2d 35, 37 (Ala. 1995) (emphasis added); *accord Woodman of the World Life Ins. Soc'y* v. *Harris*, 740 So. 2d 362, 366 (Ala. 1999). Thus, Respondents are wrong when they contend that the decision in *Med Center* to enforce an arbitration agreement according to its terms was based on that court's "own State's law," and not on the requirements of the FAA. Opp. 21.[4]

Similarly, Respondents cannot avoid the direct conflict with the holding in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1270 (Wash. Ct. App. 2001) – which refused to "compel class arbitration" where "the arbitration clause is silent" – by arguing that "the party seeking class arbitration[] had 'fail[ed] to cite relevant statutory provisions that conflict with arbitration of his claims.'" Opp. 20 (quoting *Stein*, 17 P.3d at

[4] *Leonard* v. *Terminix Int'l Co.*, No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) (per curiam), does not alter this conclusion. Opp. 21. Indeed, *Leonard* reaffirmed *Med Center*'s holding, 2002 WL 31341084 at *12 n.2, and dealt with unconscionability, *id.* at *3-*4, an issue that the court below did not address, Pet. App. 22a n.21.

1270). The quotation relied upon by Respondents is irrelevant because it is plucked from the section of the decision dealing with whether the arbitration clause should be enforced, and not with the separate question whether "the arbitration should proceed on a classwide basis." *Stein*, 17 P.3d at 1271. As to the latter issue – the one that is relevant here – the *Stein* court expressly acknowledged the conflict among the courts and adopted the *Champ* line of cases. *Id.*

b. Moreover, contrary to Respondents' arguments, Opp. 22-24, the decisions adopting the minority position also confirm the deep and mature conflict implicated by this case. Respondents argue that this conflict is "illusory," *id.* at 18, because the decisions authorizing class-action arbitration in the absence of an arbitration agreement providing for that result "have done so based on state law," *id.* at 22. But that characterization merely begs the question because the issue in this case is whether the federal law, *i.e.*, the FAA, precludes that result. In concluding that the FAA does not dictate that result, the California courts in cases such as *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998), have rejected the *Champ* line of cases and held expressly, as a matter of federal law, that "application of the California classwide arbitration rule is not preempted by the [FAA]." *Id.* at 46. Here too, the South Carolina Supreme Court acknowledged the conflicting approaches adopted by the *Champ* line of cases and the minority approach adopted by the *Blue Cross* line of cases, Pet. App. 12a-16a, and rejected the argument that it was required "to follow *Champ*, as a matter of federal substantive law." *Id.* at 19a.

In sum, this case implicates an important and recurring issue of federal law that warrants this Court's review. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 8-9 (1984) (accepting for review but dismissing, for lack of federal jurisdiction, judgment that state law authorized class-action arbitration where agreement "silent" because petitioner failed to argue before court below that FAA precluded that result).

2. Given this clear conflict, Respondents are reduced to arguing that review in this case should be denied because the decision below was correct. Opp. 12 (arguing that decision below "is consistent with this Court's decisions holding that the FAA does not preempt state law that is not in conflict with a federal standard"); *id.* at 13-18 (same). Furthermore, Respondents argue that review should be denied because, on the merits, an arbitrator's decision to permit class arbitration "is entitled to special deference." *Id.* at 25; *id.* at 25-28. Although a full response to these merits arguments is not warranted at this stage, it is nevertheless the case that Respondents misconstrue both this Court's decisions and the factual and legal bases of the decision below.

a. According to Respondents, the decision below was correctly decided unless there is "an intent by Congress for the FAA to occupy the entire field of arbitration procedures." Opp. 12. Our case does not depend on such a sweeping view of preemption. We recognize that the FAA does not "'reflect a congressional intent to occupy the entire field of arbitration.'" *Id.* at 14 (quoting *Volt*, 489 U.S. at 477). But that is beside the point. This Court's decisions make clear that the FAA can, and does, preempt state law that conflicts with the purposes of the FAA. *E.g.*, *Southland Corp.*, 465 U.S. at 12-15; *Doctor's Assocs.*, 517 U.S. at 685. Although respondents accurately quote *Volt* for the proposition that "'[t]here is no federal policy favoring arbitration under a certain set of procedural rules,'" Opp. 14 (quoting *Volt*, 489 U.S. at 476), they omit the very next sentence, which provides that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate," *Volt*, 489 U.S. at 476.

That policy, which is designed to combat long-standing judicial hostility to arbitration by ensuring enforcement of the actual agreements entered into by the parties, has been confirmed repeatedly by this Court in cases reviewing state court and federal court arbitration decisions. See, *e.g.*,

Doctor's Assocs., 517 U.S. at 688; *Mastroubono*, 514 U.S. at 53-54. To be sure, the FAA leaves parties free to choose to be bound by state law arbitration principles if they so decide. *Volt*, 489 U.S. at 476. But, here, the parties did not adopt South Carolina's arbitration rules because, as the court below correctly held, Pet. App. 11a & n.9, the agreement provides that it "shall be governed by the Federal Arbitration Act," *id.* at 110a.

b. Second, contrary to Respondents' assertion, Opp. 15-16, there is no serious basis for the suggestion that the decision below actually reflected the parties' contractual intent. The South Carolina Supreme Court ruled that class arbitration could be imposed without regard to the parties' contractual intent based upon prior South Carolina precedent which had imposed consolidated arbitration on objecting parties without "any contractual or statutory directive to do so." Pet. App. 21a. The South Carolina Supreme Court's application of that same standard to authorize the imposition of class action arbitration "without any *contractual* . . . directive to do so," *id.*, unquestionably constitutes an "'intrusion upon the contractual aspects of the relationship,'" *id.*, and therefore violates the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479.

Indeed, the court below ruled that class-action arbitration was authorized without regard to the parties' intent "if," in the court's discretion, "it would serve efficiency and equity, and would not result in prejudice," Pet. App. 22a. But, the law is clear that the FAA "leaves no place" for such "discretion," *Dean Witter*, 470 U.S. at 218; instead the FAA commands "'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 54 (quoting *Volt*, 489 U.S. at 479). Imposing class arbitration without "any contractual . . . directive to do so," Pet. App. 21a, simply "reflects the old judicial hostility to arbitration in modern and more sophisticated dress." See Br. of Am. Bankers Ass'n, et

al. as *Amici Curiae* in Support of Petition at 4, 12-17 ("forced" class arbitration is an attack on arbitration itself).

c. Finally, Respondents argue that review should be denied because "the *Arbitrator* decided that this case should proceed as a class arbitration." Opp. at 25. But the decision below makes clear that in the *Bazzle* proceeding, the trial court, not the arbitrator, ordered arbitration and "grant[ed] class certification" as to "the Bazzles and all members of their class." Pet App. 3a-4a. Nor do Respondents dispute that the arbitrator in *Lackey* accepted their arguments that class arbitration should be ordered based upon the trial court's order compelling class arbitration in the *Bazzle* proceeding. *Id.* at 5a-6a; R. on Appeal at 516.

In any event, this Court has not hesitated to grant review of important federal questions that arise out of an arbitrator's decision. *Mastrobuono*, 514 U.S. at 55; see also *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). Indeed, in *First Options*, this Court reversed an arbitrator's decision, explaining that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Id.* at 945. More generally, this Court has made clear that judicial review under sections 10 and 11 of the FAA "'ensure[s] that arbitrators comply with the requirements of the [federal statute].'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987)). Here, imposition of class arbitration without "any contractual . . . directive to do so" Pet. App. 21a, manifestly violates the core principles underlying the FAA and therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

December 10, 2002

No. 02-634

Supreme Court, U.S.
FILED
NOV 25 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

NOVEMBER 25, 2002

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA AND FUNDAMENTALLY UNFAIR. 5

A. The FAA Requires Courts To Enforce the Arbitration Agreement As Written. 5

B. Forced Class Arbitration Is Unfair to Absent Class Plaintiffs and to Defendants. 8

1. *Forced "Class Arbitrations" May Not Be Binding on Absent Plaintiff "Class" Members.* 9

2. *Forced Class Arbitration Is Unfair to Defendants.* 11

II. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF. 12

A. Forced Class Arbitration Threatens the Viability of Arbitration Agreements in Consumer Contracts. 13

B. Parties May Not Be Able To Avoid the Issues in This Case by Drafting Around Them. 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Page(s)

ACORN v. Household International, Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) 15
Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992) 12
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 5, 7, 13
Baron v. Best Buy Co., No. 99-14028, slip op. (11th Cir. June 1, 2001) 16
Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779 (Ct. App. 1998) 6, 14
Bowen v. First Family Financial Services, Inc., 233 F.3d 1331 (11th Cir. 2000) 16
Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 14
Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 5, 6
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 5, 7
Comb v. Paypal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) 15
Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991) 6, 14
Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 17
Dominium Austin Partners, LL v. Emerson, 248 F.3d 720 (8th Cir. 2001) 6
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 7
Flexible Manufacturing Systems Pty. Ltd. v. Super Products Corp., 86 F.3d 96 (7th Cir. 1996) 12
Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673 (D. Minn. 1993) 6

TABLE OF AUTHORITIES—Continued

Page(s)

General Telephone Co. v. Falcon, 457 U.S. 147 (1982) 14
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7, 16
Hale v. First USA Bank, N.A., No. 00CIV5406JGK, 2001 WL 687371 (S.D.N.Y. June 19, 2001) 16
Hansberry v. Lee, 311 U.S. 32 (1940) 8, 10
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir 1995) 12
Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000) 16
Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984) 6, 14
Leonard v. Terminix International Co., L.P., No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) 16
Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000) 16
Lloyd v. MBNA America Bank, N.A., No. Civ.A. 00-109-SLR, 2001 WL 194300 (D. Del. Feb. 22, 2001) 16
Lytle v. CitiFinancial Services, Inc., No. 42 EDA 2001, 2002 WL 31388882 (Pa. Super. Ct. Oct. 24, 2002) 16
Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909 (N.D. Tex. 2000) 16
Martin v. Wilks, 490 U.S. 755 (1989) 8
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 6
McCarthy v. Providential Corp., No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Med Center Cars, Inc. v. Smith, 727 So. 2d 9 (Ala. 1998) 6
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 8
Pennoyer v. Neff, 95 U.S. 714 (1877) (mem.) 8
Perry v. Thomas, 482 U.S. 483 (1987) 6, 17
Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 10
Randolph v. Green Tree Financial Corp.—Alabama, 244 F.3d 814 (11th Cir. 2001) 16
Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) 11
Remmey v. Paine Webber, Inc., 32 F.3d 143 (4th Cir. 1994) 15
Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 7
Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001) 16
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 16
Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972) 11
Southland Corp. v. Keating, 465 U.S. 1 (1984) 6, 17
Stein v. Geonerco, Inc., 17 P.3d 1266 (Wash. Ct. App. 2001) 6
Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862 (Ct. App. 2002) 16
Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *appeal filed*, No. 02-15416 (9th Cir. 2002) 16
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 11
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 9, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) 6, 7
Zawikowski v. Beneficial National Bank, No. 98C2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) 16

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... 3, 5
9 U.S.C. § 10 12
Fed. R. Civ. P. 23 ..... 8, 12

LEGISLATIVE AUTHORITIES

H.R. Rep. No. 97-542 (1982) 5, 13
S. Rep. No. 68-536 (1924) 13

ADMINISTRATIVE AGENCY MATERIALS

SEC, Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659 (Nov. 4, 1992) 15

BOOKS, ARTICLES & TREATISES

Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire?, 67 Va. L. Rev. 789 (1981) 14
Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) 12
Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78 (1985) 11
Herbert Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 10, 14
Judith Resnik, *Money Matters: Judicial Market* Interventions *Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119 (2000) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000) 10

In the Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This *amici curiae* brief[1] is submitted in support of the petitioner, Green Tree Financial Corp. a/k/a Green Tree Acceptance Corp. a/k/a Green Tree Financial Services Corp.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

n/k/a Conseco Finance Corp. By letters filed with the Clerk of the Court, petitioner and respondents have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in all fifty states and the District of Columbia and include banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately ninety percent of the domestic assets of United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance to banks or consumers of banking services. Many ABA member banks provide in their consumer loan agreements and deposit contracts for arbitration of disputes. Some of those agreements are silent as to class-action procedures, and others expressly state that class arbitrations are not permitted.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies that engage in lending and sales financing amounting to approximately twenty percent of all consumer credit in the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial-services, retail, and automobile sales finance companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs. Some AFSA members include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters, with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. Some

CBA members include arbitration agreements in their consumer loan documents and deposit contracts.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the Court should grant the writ to resolve the split between the majority view that arbitration agreements should be enforced as written, and the minority view that a type of class action procedure can be imposed on parties who have not agreed to it. *Amici* write to stress the importance of correcting the error of the Supreme Court of South Carolina, because of the undesirable consequences of forced class arbitrations. *Amici* make three main points.

1. The whole theory of the Federal Arbitration Act (the "FAA" or "Act"), 9 U.S.C. §§ 1-16, is that firms and individuals have the right to bargain about the mechanism they will use to resolve future disputes, and their bargains should be enforced. The basis for arbitration is private contracts. The enforceability of private contracts, on this and other subjects, is of course at the heart of our legal system, and the Act was adopted because judicial hostility to arbitration was wrongfully rendering this kind of private contract effectively unenforceable. Imposing an obligation to arbitrate in a procedure to which a person did not agree, or including parties that such person did not agree to include, violates the most basic terms of the Act.

2. Forced class arbitrations are necessarily unfair to absent plaintiff "class" members and to defendants. First, it obviously will be argued that it is unfair to bind absent class members to the results of an arbitration, for the most basic of reasons: they have not agreed to have their claims resolved by this particular private decision maker. Without delving deeply into the reasons for this, it is fair to say that all persons within the courts' respective jurisdictions are inherently bound by the decisions of courts created by constitutions and statutes to resolve disputes. But no person is bound by the decisions of a private decision maker unless he has agreed to

be bound. This is not merely a matter of notice, the argument goes: a person has no obligation to respond to such a notice, or to give up any rights after receiving a notice, unless he has agreed to the decision making procedure. Second, it is obviously also unfair to subject a defendant to a forced class arbitration in which if he wins he defeats only the named plaintiffs but if he loses the rest of the "class" can latch on. That is not what happens in true, judicial class actions, and this kind of one-sided class procedure would obviously make arbitration an unacceptable alternative for the party (such as a lender) that stands to win only against an individual but to lose to a "class." Such parties would simply avoid arbitration.

3. The decision of the court below reflects the old judicial hostility to arbitration in modern and more sophisticated dress. Its premise is that parties cannot arbitrate their disputes on an individual basis even if they have agreed to do so. That premise is at odds with the FAA and this Court's decisions. Moreover, even the courts favoring such an approach concede that it would require major ongoing court involvement in each class arbitration, injecting courts intimately and extensively into a process designed to avoid the costs and delays of litigation. Other courts have held, more directly, that arbitration agreements that fail to provide for class arbitration are unconscionable—a direct expression of the ancient hostility that this Court should, once again, make clear the FAA has banished.

Amici urge this Court to grant the writ to resolve these important issues and to ensure the continued viability of arbitration in consumer contracts.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA AND FUNDAMENTALLY UNFAIR.

Amici strongly believe that arbitration in accordance with the parties' written agreement is a fair and effective way to adjudicate disputes. As Congress found in 1982, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing ... dealings among the parties ...." H.R. Rep No. 97-542, at 13 (1982); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12, 122-23 (2001). In particular, arbitration is "helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). Forced class arbitration, by contrast, forfeits these advantages and is unfair to absent "class" plaintiffs and defendants.[2]

A. The FAA Requires Courts To Enforce the Arbitration Agreement As Written.

The fundamental policy of the Federal Arbitration Act (the "FAA" or "Act"), 9 U.S.C. §§ 1-16, is that courts should enforce private arbitration agreements in accordance with their terms, just as they enforce any other private agreement. The court below, however, joined the minority of courts in imposing on the parties before it an arbitration procedure

---

[2] A party who is deciding whether to agree to arbitration is making a decision whether the benefits of arbitration outweigh its limitations. Converting an agreement to arbitrate into a class arbitration, however, radically alters this calculus. For a court "to read such a term into the parties' agreement would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration." *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotations and brackets omitted).

wholly different from the one to which they agreed.[3] Such courts would apparently impose on absent class members various obligations in a proceeding they did not choose to bring, before a decision maker not selected in accordance with *their* arbitration agreements, in which they will not have the rights of participation they bargained for; and imposing on every one concerned an obligation to proceed together with a large number of parties and claims that no one agreed to include in the resolution of his, her or its disputes. The majority of courts confronted with this issue have held that arbitration agreements should be enforced based on their actual terms.[4]

Amici agree with petitioner that the Court should grant the writ to resolve this split in authority. The fundamental policy of the FAA, as this Court has repeatedly made plain, is that "private agreements to arbitrate are [to be] enforced according to their terms." *Volt Info. Scis., Inc. v. Board of Trs.*, 489 U.S. 468, 479 (1989); *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). That directive is not surprising because, after all, an arbitration clause is simply a contract between two parties to resolve their dispute in

[3] *See, e.g., Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

[4] *See, e.g., Dominium Austin Partners*, 248 F.3d at 728; *Champ*, 55 F.3d at 275; *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal. July 19, 1994) (a court "cannot compel arbitration on a class basis where the agreement did not specifically provide for it"); *Gammaro v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) ("The Court must give effect to the agreement of the parties, and this arbitration agreement makes no provision for class treatments of disputes. Accordingly, the Court finds that it is without power to order this matter to proceed to arbitration as a class action.") (footnote omitted); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998).

a particular way. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties."). As such, an arbitration clause is enforced "like other contracts." *Volt Info. Scis.*, 489 U.S. at 478.

But early attempts to enforce arbitration agreements were met with hostility by the courts, "a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores*, 532 U.S. at 111. Congress therefore passed the FAA "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270 (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989). "[G]eneralized attacks on arbitration," *Gilmer*, 500 U.S. at 30, and the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . [have] fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes," *Rodriquez de Quijas*, 490 U.S. at 481 (citation omitted).

Just such a suspicion of arbitration is what led to the result below. The court asserted that "parties with nominal individual claims" would have no effective "avenue for relief." Pet. App. 22a. It therefore imposed a private decision making procedure to which neither those parties nor the absent "class members" who would become involved had agreed. As the majority of courts, including every federal court to reach the issue, have held, when an arbitration agreement is silent as to class arbitration, arbitration must proceed on an individual basis and courts and arbitrators are powerless to rewrite the parties' agreement to compel class arbitration.[5]

[5] *See, e.g.*, cases cited *supra* n.4

B. Forced Class Arbitration Is Unfair to Absent Class Plaintiffs and to Defendants.

The significance of the fact of forced class arbitration is not merely that the parties' agreement was not enforced based on its terms: forced class arbitration also raises fundamental issues of fairness to the parties. Exactly who is harmed by this form of action depends on whether any "class" arbitration decision will be binding on absent class members.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Pennoyer v. Neff*, 95 U.S. 714 (1877) (mem.). Class actions represent a narrow exception to this "deep-rooted historic tradition." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (internal quotations omitted); *see Hansberry*, 311 U.S. at 41. This Court has carefully guarded the rights of absent class members, who have a protected property interest under the Due Process Clause. *See Hansberry*, 311 U.S. at 42. Class actions are binding on absent class members only if due process has been afforded them. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Martin*, 490 U.S. at 762 n.2; *see also Hansberry*, 311 U.S. at 42. The requirement of due process is now embodied, in federal judicial proceedings, in Federal Rule of Civil Procedure 23, which was adopted pursuant to the Constitution and the laws of the United States and which determines what is necessary, and generally sufficient, to protect the rights of absent parties (and therefore to bind them). But it is argued that there is no such basis for imposing requirements that assure the rights of absent parties (or bind them) in an arbitration conducted pursuant to a private agreement between one lender and one customer.

1. *Forced "Class Arbitrations" May Not Be Binding on Absent Plaintiff "Class" Members.*

Consumer advocates have argued that there is simply no basis for binding absent plaintiff "class" members to the results of a forced "class arbitration." Even if they have entered into their own one-on-one arbitration agreements, they have not, it is asserted, agreed to have their claims (if any) resolved by a private decision maker chosen in somebody else's arbitration proceeding, or in a class format in which their own participation will not be what they bargained for.

The core of this argument is that judicial class actions are "state-enabled" mechanisms, *see* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. Pa. L. Rev. 2119, 2144-48 (2000), and both the class action device and the judges that oversee them derive their legitimacy from our whole system of government. Arbitrators, however, derive their legitimacy from the parties' private contract. *Cf. United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (noting that an arbitrator's "award is legitimate only so long as it draws its essence from the" parties' agreement). Unless individuals have agreed to have their claims decided in a class arbitration in which they will not be direct participants, an arbitrator cannot deal with their claims with either the governmental legitimacy of a court deciding a class action or the contractual legitimacy of an arbitrator deciding a single case. Consumer advocates have stated quite clearly, that "arbitral resolution of the claims of a plaintiff class cannot have preclusive effect on absent class members since arbitrators have no authority to bind absent parties." *See* Brief *Amicus Curiae* of Public Citizen at 23-24, *Green Tree Fin. Corp.—Alabama v. Randolph*, No. 99-1235 (U.S. 2000).

The legitimacy problem is illustrated in this case by the provision in the arbitration clause that specifically reserved the selection of the arbitrator *to the parties whose interests*

were at stake. ("All disputes, claims, or controversies . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a.) Commentators have objected that, in cases like this, "absent class members will ultimately be bound by the ruling of an arbitrator they had absolutely no role in selecting," Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 112 (2000),[6] but surely the true problem is the opposite: arguably, they cannot be bound at all.

Moreover, unlike court proceedings, which are presumptively open, *see, e.g., Press Enter. Co. v. Superior Court*, 464 U.S. 501, 507 (1984), arbitration is a private dispute resolution mechanism, whose proceedings are not necessarily even memorialized in a transcript. *E.g.*, Sternlight, 42 Wm. & Mary L. Rev. at 114. This is not a problem (and may be an advantage) in resolving one-on-one disputes, but private proceedings are wholly unworkable where the rights of "absent class members" are being decided. *See Hansberry*, 311 U.S. at 41.

Another important objective of the protections afforded in judicial class actions is to prevent "the fraudulent and collusive sacrifice of the rights of absent parties." *Hansberry*, 311 U.S. at 45; Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* § 11.65 (3d ed. 1992). The key to preventing class representatives and defendants from engineering a course of litigation or settlement that is unfair to absent persons is the role of the trial judge. But because arbitrators who are selected by only the present parties lack tenure, and have no "jurisdiction" beyond what the parties have conferred on them, they may be far less willing or able to protect

[6] As Professor Sternlight notes, "the arbitrator will have been selected at least in part by the named plaintiffs or their attorneys, not by the absent class members. Thus, it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing." *Id.* at 113 (citations omitted).

absentees against collusion by the parties who appointed them.

It is especially hard to see how a forced "class arbitration" could be *settled* with an assurance of fairness to all. There are no established rules, either in law or the private contracts in this case, for arbitrator approval of class settlements or for participation by absent persons. For example, in an arbitration any objectors would—unless the entire proceedings have been conducted in a way largely foreign to arbitration—have no opportunity to scour the record to ensure that the settlement is appropriate.[7] In sum, it is all but impossible to imagine a court holding that the outcome of a forced class arbitration, whether decision or settlement, was binding on absent plaintiff "class" members—particularly if defendants prevail.

2. *Forced Class Arbitration Is Unfair to Defendants.*

If forced class arbitration decisions are not binding on absent plaintiff class members, then forced class arbitrations are obviously fundamentally unfair to the defendant: if he wins he defeats only the named plaintiffs but if he loses the rest of the class may latch on. One of the functions of class action procedures is at least roughly to level the playing field, so that the stakes are the same on both sides. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (noting that one of the benefits of class actions is "the

[7] *See* Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 80 (1985) (noting that in general, arbitrations are not open to the public and there is no record of the proceedings kept); *see also, e.g., United Steelworkers of Am.*, 363 U.S. at 598 ("[a]rbitrators have no obligation . . . to give their reasons for an award at all"); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 8-9 (1st Cir. 1989) (holding that arbitrators are not required to issue written opinions); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214-15 (2d Cir. 1972) (same). By contrast, objectors in court are free to review the record to assist them in attacking any settlement. *See generally* 2 *Newberg on Class Actions* §§ 11.57-58 (discussing the rights of objectors to class settlements).

protection of the defendant from inconsistent obligations"). A forced procedure that leaves a defendant with far more at risk than the plaintiff will bring a swift end to many agreements to arbitrate.

This point is illustrated in a related context. Under Federal Rule of Civil Procedure 23(f), a court's decision to certify a case as a class action may be immediately appealed. The rule was adopted to address the concern that "[a]n order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 (Advisory Committee Notes).[8] But a defendant in a forced class arbitration faces a far worse threat: it has no offsetting chance to *win* a class victory, and it typically has no avenue for immediate appeal of the "class" determination and has only limited judicial review after an arbitration award has been entered. *See* 9 U.S.C. § 10; *see also, e.g., Flexible Mfg. Sys. Pty. Ltd v. Super Prods. Corp.*, 86 F.3d 96 (7th Cir. 1996); *Ainsworth v. Skurnick*, 960 F.2d 939 (11th Cir. 1992). Such a procedure is substantially less fair to a defendant than either a class action in court or an individual arbitration.

II. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF.

The decision below reflects a modern and more sophisticated form of the old judicial hostility toward arbitration. Uncorrected, it will bring a swift end to arbitration agreements in consumer contracts.[9]

---

[8] *See also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (discussing the problem of "blackmail settlements" involved in large scale multistate class actions); *cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294, 1298 (7th Cir 1995) (granting the "extraordinary" relief of mandamus to review district court decision on class certification because of "pressure to settle" even in case where previous similar suits had been won by defendant).

[9] The problems discussed in this part are even more serious than the split of authority between the majority and minority views. A lender or other firm does not know where a customer will reside in the future or initiate proceedings. If any jurisdictions force "class arbitrations," every contract that provides for arbitration carries some risk of these unacceptably one-sided proceedings.

A. Forced Class Arbitration Threatens the Viability of Arbitration Agreements in Consumer Contracts.

Parties enter into arbitration agreements to avoid the expense and delay of litigation. As the Senate Report stated, "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase." S. Rep. No. 68-536, at 3 (1924).[10] Over the latter part of the twentieth century, arbitration evolved to provide a quick, inexpensive, and fair alternative to litigation. H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility ... ; [and] it is often more flexible in regard to scheduling ...."); *see also Allied-Bruce Terminix*, 513 U.S. at 280 ("Indeed, arbitration's advantages often would seem helpful to individuals, ... complaining about a product, who need a less expensive alternative to litigation.").

Courts, however, have remained hostile. One form of that hostility, illustrated in this case, is to impose class procedures. Then, in an attempt to appear to deal with the obvious issues of fairness, courts and commentators suggest significant judicial oversight and interference in the arbitration process. For example, in this *Bazzle* case, the trial court, not the arbitrator, considered the class certification motion and ordered certification of the class. Pet. App. 3a. The result is to replace the arbitration the parties agreed to with a con-

---

[10] The Report went on to document the fact that arbitration typically takes weeks where litigation typically takes years; that the costs of arbitration are "trifling" compared to the expense of litigation; and that the participants in arbitration—"winners and losers alike"—are broadly satisfied with the arbitration process. *Id.*

glomerate proceeding that is more to the courts' liking. Even courts that compel forced class arbitration concede that "[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 786-87 (Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991). Indeed, these courts have gone so far as to acknowledge that it will be difficult for courts "to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay." *Keating*, 645 P.2d at 1209 (citing *Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 Va. L. Rev. 789 (1981)). Courts may be forced, as the court in *Bazzle* below did, "to make initial determinations regarding certification and notice to the class." *Id.* Alternatively, the Court may decide it must review such decisions made initially by the arbitrator. In either event, if court involvement is required to determine whether a class should be certified, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). This will require the courts to make decisions on certification based on the courts understanding of "the claims, defenses, relevant facts, and applicable substantive law." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Moreover, any such "careful court monitoring" would likely have to continue throughout the litigation. 1 *Newberg on Class Actions* § 1.13. Courts may also be required to "exercise a measure of external supervision" over dismissals and settlements in forced class arbitrations. *Keating*, 645 P.2d at 1209.

At best, these conglomerate proceedings would defeat the very purposes arbitration was designed to serve. This

form of judicial intervention, and multiplication of proceedings, is exactly what the FAA was intended to prevent and runs contrary to the simplifying purpose of agreeing to private arbitration instead of judicial resolution of disputes. As the Fourth Circuit noted in another context, such judicial participation would "reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality." *Remmey v. Paine Webber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994). So it is here.[11]

Most important, parties simply will not offer or agree to an arbitration agreement if that agreement can cause them to be forced into a proceeding that is both unfair and clumsy. This may be what some courts who are hostile to arbitration hope, but it is contrary to federal policy embodied in the FAA.

B. Parties May Not Be Able To Avoid the Issues in This Case by Drafting Around Them.

Finally, we note that parties cannot necessarily avoid the threat of forced class arbitration by stating even more explicitly in their agreements that arbitration will not be done on a class basis. The court below suggested (Pet. App. 22a n.21) that it might reject an arbitration agreement containing such a bar as unconscionable. Some other courts have already done so. Their hostility to arbitration could hardly be more clear. *See, e.g., Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171, 1174 (N.D. Cal. 2002); *Ting v. AT&T*,

---

[11] These types of concerns led the securities industry to reject class arbitration, because, as the Securities and Exchange Commission concluded: "Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions. Duplication of the often complex procedural safeguards necessary for these hybrid lawsuits is unnecessary [in arbitration]." SEC, Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659, 52,661 (Nov. 4, 1992).

182 F. Supp. 2d 902, 931 (N.D. Cal. 2002), *appeal filed*, No. 02-15416 (9th Cir. 2002); *see also, e.g., Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000); *Leonard v. Terminix Int'l Co., L.P.*, No. 1010555, 2002 WL 31341084, at *8 (Ala. Oct. 18, 2002); *Lytle v. CitiFinancial Servs., Inc.*, No. 42 EDA 2001, 2002 WL 31388882, at *19 (Pa. Super. Ct. Oct. 24, 2002); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867-68 (Ct. App. 2002).[12]

This Court has held that arbitration agreements are enforceable so long as the parties can effectively vindicate their substantive rights. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (rejecting a claim that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for . . . class actions"). The combination of

[12] The majority rule is that arbitration agreements that prohibit class arbitrations or class actions in favor of individual arbitration are fully enforceable under the FAA. *See, e.g., Randolph v. Green Tree Fin. Corp.—Alabama*, 244 F.3d 814 (11th Cir. 2001) (on remand from the Supreme Court, holding that agreement to arbitrate TILA claims is enforceable, even though it precludes class actions); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding that TILA claims are subject to binding arbitration); *Baron v. Best Buy Co.*, No. 99-14028, slip op. at 3 (11th Cir. June 1, 2001) (arbitration clause enforceable, "*even if class actions are not maintainable under the clause*") (emphasis added) (citing *Randolph*, 244 F.3d at 818-19 and *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1338 (11th Cir. 2000)); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000) ("While Plaintiffs may not be able to utilize the procedural vehicle of a class action in arbitration, they retain all of their substantive statutory rights . . . ."); *Hale v. First USA Bank, N.A.*, No. 00CIV5406JGK, 2001 WL 687371, at *7 (S.D.N.Y. June 19, 2001) (citing authority); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 631-32 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Lloyd v. MBNA America Bank, N.A.*, No. Civ.A. 00-109-SLR, 2001 WL 194300, at *3 (D. Del. Feb. 22, 2001); *Zawikowski v. Beneficial Nat'l Bank*, No. 98C2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999).

the cases cited above and the rulings in *Bazzle* et al. is to supply another condition: arbitration agreements must provide for class action arbitrations. This is precisely the sort of condition to the enforcement of an arbitration agreement that is forbidden under the FAA.[13]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

NOVEMBER 25, 2002

[13] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that States are "precluded . . . from singling out arbitration provisions for suspect status"); *Perry v. Thomas*, 482 U.S. 483 (1987) (striking California statute prohibiting arbitration of wage collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) ("[T]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by . . . state courts or legislatures.") (alterations in original).

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-634

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

JOINT APPENDIX

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
VIRGINIA M. VANDER JAGT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

CORNELIA T.L. PILLARD*
GEORGETOWN UNIVERSITY LAW CENTER
Room 416
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9391

MARY LEIGH ARNOLD
MARY LEIGH ARNOLD, P.A.
P.O. Box 265
Mt. Pleasant, SC 29465
(843) 971-6053

Counsel for Respondents
* Counsel of Record
[Additional Counsel Listed on Inside Cover]

February 24, 2003

PETITION FOR CERTIORARI FILED OCTOBER 23, 2002
CERTIORARI GRANTED JANUARY 10, 2003

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS &
POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON
LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

Counsel for Petitioner

BRADFORD P. SIMPSON
D. MICHAEL KELLY
B. RANDALL DONG
SUGGS & KELLY LAWYERS,
P.A.
P.O. Box 8113
Columbia, SC 29202-0008
(803) 461-2163

STEVEN W. HAMM
RICHARDSON, PLOWDEN,
CARPENTER & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, SC 29202
(803) 771-4400

T. ALEXANDER BEARD
BEARD LAW FIRM
1002 Anna Knapp Boulevard
Mt. Pleasant, SC 29464
(843) 216-0331

CHARLES L.A. TERRENI
P.O. Box 11904
Columbia, SC 29211
(803) 771-2611

CHARLES L. DIBBLE
DIBBLE LAW OFFICES
P.O. Drawer 1240
Columbia, SC 29202
(803) 254-0307

DANIEL WEBSTER WILLIAMS
BEDINGFIELD & WILLIAMS
P.O. Box 616
Barnwell, SC 29812
(803) 259-2759

Counsel for Respondents

TABLE OF CONTENTS

	Page
Court of Common Pleas, Barnwell County, South Carolina, Docket Entries, *Lackey* v. *Green Tree Fin. Corp.*, No. 1996-CP-0600073	1
Court of Common Pleas, Dorchester County, South Carolina, Relevant Docket Entries, *Bazzle* v. *Green Tree Fin. Corp.*, No. 00-CP-18-793 F/K/A C/A No. 97-CP-18-258	6
Supreme Court, South Carolina, Relevant Docket Entries, *Bazzle* v. *Green Tree Fin. Corp.*, No. 25523	10
Memorandum of Green Tree Fin. Corp., *Lackey* v. *Green Tree Fin. Corp.*, No. 96-CP-06-073 (Ct. Com. Pl. Barnwell County, S.C. filed Aug. 14, 1998) (In Arbitration) (excerpt)	15
Notice of Class Action, *Lackey* v. *Green Tree Fin. Corp.*, No. 96-CP-06-073 (Ct. Com. Pl. Barnwell County, S.C. filed Feb. 15, 1999) (In Arbitration)	17
Consent Order for Bifurcation, *Lackey* v. *Green Tree Fin. Corp.*, No. 96-CP-06-073 (Ct. Com. Pl. Barnwell County, S.C. Mar. 2, 2000) (In Arbitration)	24
Plaintiffs' Memorandum in Support of Motion to Confirm Final Order and Award in Arbitration and in Opposition of Motion to Vacate, *Bazzle* v. *Green Tree Fin. Corp.*, No. 00-CP-18-793 F/K/A C/A No. 97-CP-18-258 (Ct. Com. Pl. Dorchester County, S.C. filed Sept. 2, 2000) (excerpts)	26

TABLE OF CONTENTS—continued

Page

Retail Installment Contract and Security Agreement (Burt and Lynn Bazzle) 33

Retail Installment Contract and Security Agreement (Daniel Lackey) 35

Transcript of Arbitration Hearing, *Lackey* v. *Green Tree Fin. Corp.*, 96-CP-06-073 (Ct. Com. Pl. Barnwell County, S.C. Mar. 6-8, 2000) (excerpts) 37

Deposition of Harry J. Haynsworth, IV, *Lackey* v. *Green Tree Fin. Corp.*, 96-CP-06-073 (Ct. Com. Pl. Barnwell County, S.C. Mar. 8, 2000) (excerpts) 39

NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 02-634 Petition For A Writ Of Certiorari at the following pages:

Page

Bazzle v. *Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2001) 1a-26a

Bazzle v. *Green Tree Fin. Corp.*, No. 00-CP-18-793 F/K/A C/A No. 97-CP-18-258 (Ct. Com. Pl. Dorchester County, S.C. Sept. 15, 2000) (Order Confirming Award) 27a-35a

TABLE OF CONTENTS—continued

Page

Lackey v. *Green Tree Fin. Corp.*, No. 96-CP-16-073 (Ct. Com. Pl. Barnwell County, S.C. Dec. 19, 2000) (Order Confirming Final Order and Award in Arbitration) 36a-54a

Bazzle v. *Green Tree Fin. Corp.*, No. 97-CP-18-258 (Ct. Com. Pls. Dorchester County, S.C. July 25, 2000) (Final Order and Award in Arbitration) 55a-81a

Lackey v. *Green Tree Fin. Corp.*, No. 96-CP-16-073 (Ct. Com. Pl. Barnwell County, S.C. July 25, 2000) (Final Order and Award in Arbitration) ... 82a-110a

COURT OF COMMON PLEAS
BARNWELL COUNTY, SOUTH CAROLINA

Docket No. 1996-CP-0600073

DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS,
on behalf of themselves and all others similarly situated,
Plaintiffs.

v.

GREEN TREE FINANCIAL CORPORATION,
Defendant,

DOCKET ENTRIES

DATE	PROCEEDINGS
5/28/1996	DOCUMENT BY PLAINTIFF S & C
6/06/1996	DOCUMENT BY PLAINTIFF AFF OF SERV/ C&T/S&C/06/01/96
7/30/1996	DOCUMENT BY DEFENDANT ANSWER
7/30/1996	DOCUMENT BY DEFENDANT MOTION TO STAY & TO COMPEL ARBITRATION
8/20/1996	DOCUMENT BY DEFENDANT AFFIDAVIT OF IRA P USRY
8/20/1996	DOCUMENT BY DEFENDANT AFFIDAVIT OF PAUL W. ROBISON
9/16/1996	DOCUMENT BY PLAINTIFF PLF MEMO IN OPPOSITION TO DEF MOTION TO COMPEL ARBITRATION

DATE	PROCEEDINGS
9/26/1996	DOCUMENT BY PLAINTIFF AFFIDAVIT OF PAULA JOHNSON
9/26/1996	DOCUMENT BY PLAINTIFF AFFIDAVIT OF DANIEL LACKEY
10/08/1996	DOCUMENT BY PLAINTIFF MOTION FOR CLASS CERTIFICATION
10/18/1996	DOCUMENT BY DEFENDANT REPLY TO PLFT'S MEMORANDUM
10/18/1996	DOCUMENT BY DEFENDANT MEMO IN SUPPORT OF MOTION FOR S/J
11/14/1996	ORDER/DEF MOT TO STAY ACTION & COMPEL ARBITRATION IS DENIED
12/17/1996	DOCUMENT BY DEFENDANT NOTICE OF APPEAL/SUPREME COURT
1/28/1997	LTR/STAYED
2/12/1997	ORDER/STAY
2/18/1997	DOCUMENT BY PLAINTIFF MOTION TO NOTIFY PUTATIVE CLASS MEMBERS
2/21/1997	AFF OF FRANK THOMAS
3/12/1997	(TO NOTIFY CLASS MEMBERS) ORDER/ MOTION DENIED
3/25/1997	ORDER/PLF MOTION TO ALTER OR AMEND ORDER DENIED
3/11/1997	LTR FROM T A BEARD TO JUDGE PLEICONES 03/11/97
11/10/1997	DOCUMENT BY DEFENDANT NOT OF MOTION & MOTION FOR A PROTECTIVE ORDER

DATE	PROCEEDINGS
4/03/1998	COURT OF APPEALS REVERSED & REMANDED ORDER
7/27/1998	ORDER/ASSIGNING TO JUDGE THOMA J ERVIN 7/27/98
11/23/1998	DOCUMENT BY DEFENDANT MOTION TO STAY ARBITRATION ORDER
1/21/1999	MOTION TO STAY ARBITRAT IS DENIED
1/25/1999	DOCUMENT BY PLAINTIFF MEMORAN-DUM IN SUPPORT OF MOTIO TO STAY
5/19/1999	ORDER DENYING DEF MOTION TO STAY ARBITRATION
5/24/1999	AFF OF PUBLICATION
5/25/1999	DOCUMENT BY PLAINTIFF AFF OF PUBLICATION
11/23/1999	ORDER/PARTIES AGREE TO BINDING ARBITRATION
7/25/2000	ORDER
7/25/2000	FINAL ORDER & AWARD IN ARBITRA
7/25/2000	DOCUMENT BY PLAINTIFF MOTION TO CONFIRM AWARD
7/25/2000	DOCUMENT BY PLAINTIFF CERT OF SERV ON MOTION TO CONFIRM AWARD
8/07/2000	DOCUMENT BY DEFENDANT MOTION TO REMAND TO ARBITRATOR
8/14/2000	DOCUMENT BY PLAINTIFF OBJECTION TO DEF'S MOTION TO REMAND CASE TO ARBITRATOR

DATE	PROCEEDINGS
8/21/2000	DOCUMENT BY DEFENDANT MOTION TO VACATE AWARD IN ARBI & OBJECTION TO MOTION TO CONFI AWARD
8/21/2000	DOCUMENT BY DEFENDANT MEMO-RANDUM OF GREEN TREE IN SUPPORT OF MOTION TO VACATE ARBITRATORS AWARD
8/22/2000	DOCUMENT BY PLAINTIFF MEM IN SUPPORT OF MOTION TO CONFIRM FINAL ORDER&AWARD ARBI & OPPOSITION TO MOT TO VACATE
9/20/2000	DOCUMENT BY DEFENDANT REPLY TO PLF MEMORANDUM
10/17/2000	DOCUMENT BY PLAINTIFF RETURN TO DEF REPLY BRIEF
12/19/2000	ORDER CONFIRMING FINAL ORDER & AWARD IN ARBITRATION AND DENYI MOTION TO VACATE
1/16/2001	DOCUMENT BY DEFENDANT NOTICE OF APPEAL
2/09/2001	ORDER OF DISMISSAL FROM SC COUR OF APPEALS
3/06/2001	LETTER FROM SC COURT OF APPEAL GRANTING PETITION TO REINSTATE APPEAL
6/29/2001	ORDER APPROVING BOND & GRANTIN SUPERSEDEAS
7/23/2002	CONSENT ORDER MODIFYING SUPERS-EDEAS BOND 7/22/2002

DATE	PROCEEDINGS
10/14/2002	ORDER FROM THE SC SUPREME CRT AFFIRMING THE ARBITRATOR'S AWARD IN BOTH CASES
10/16/2002	DOCUMENT BY DEFENDANT MOTION TO STAY ENFORCEMENT OF JUDGMENT
11/06/2002	ORDER GRANTING DEF MOTIONS TO STAY ENFORCEMENT
12/16/2002	DOCUMENT BY DEFENDANT WRIT OF SUPERSEDEAS BOND

COURT OF COMMON PLEAS
DORCHESTER COUNTY, SOUTH CAROLINA

No. 00-CP-18-793
F/K/A C/A No. 97-CP-18-258

LYNN W. BAZZLE and BURT A. BAZZLE,
in a representative capacity on behalf of a class
and for all others Similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

RELEVANT DOCKET ENTRIES*

DATE	PROCEEDINGS
3/25/97	Summons and Complaint
4/21/97	Amended Complaint
4/21/97	Plaintiff's Motion for Class Certification
5/08/97	Answer of Green Tree Financial Corporation
5/28/97	Answer to Amended Complaint
5/28/97	Return to Motion for Class Certification
5/28/97	Defendants' Motion to Stay and Compel
8/15/97	Affidavit of Jeffrey Surratt

* Compiled from the pleadings on file with the Court of Common Pleas, Dorchester County, South Carolina.

DATE	PROCEEDINGS
8/28/97	Plaintiffs' Motion to Compel Relating to Plaintiffs' First Set of Interrogatories and Request to Produce
9/08/97	Defendants' Motion for Protective Order
12/02/97	Hearing
12/05/97	Defendants' Memorandum in Support of Motion to Compel Arbitration
12/05/97	Plaintiffs' Memorandum of Law
12/05/97	Plaintiffs' Memorandum in Opposition to Motion to Compel Arbitration
12/05/98	Ruling on Defendants' Motion to Compel
12/05/98	Ruling on Plaintiffs' Motion for Class Certification
1/05/98	Order Granting Defendants' Motion to Compel
1/05/98	Order Compelling Discovery
1/05/98	Order Granting Class Certification
1/07/98	Supplemental Order Granting Class Certification
1/20/98	Defendants' Motion for Reconsideration
2/04/98	Defendants' Memorandum in Support of Motion for Reconsideration
2/05/98	Order Expediting Transcript
2/06/98	Plaintiffs' Motion for Rule to Show Cause
2/24/98	Plaintiffs' Memorandum in Opposition to Motion to Reconsider
2/24/98	Hearing on Motion to for Reconsideration
3/17/98	Order Denying Motion for Reconsideration

DATE	PROCEEDINGS
3/20/98	Defendants' Return to Rule to Show Cause and Motion for Sanctions
4/03/98	Defendants' Notice of Appeal
4/14/98	Plaintiffs' Motion to Compel
4/24/98	Order
5/04/98	Order
6/15/98	April 28, 1998 Order of Court of Appeals dismissing appeal filed with Court of Common Pleas
7/01/98	Notice of Motion
7/29/98	Order
2/09/99	Feb. 5, 1999 letter from Supreme Court of South Carolina re: Order Denying Defendants' Petition for a Writ of Certiorari, filed with Court of Common Pleas
2/12/99	Feb. 11, 1999 Remittitur of the South Carolina Court of Appeals filed with Court of Common Pleas
2/24/99	Plaintiffs' Motion to Compel Appointment of Arbitrator
5/10/99	Defendants' Notice of Motion and Motion to Dismiss
5/20/99	Defendants' Return to Motion to Appoint Arbitrator
5/20/99	Hearing on Motion to Compel and Motion to Dismiss
6/02/99	Order Appointing Arbitrator
7/19/00	Judgment on Order by the Court

DATE	PROCEEDINGS
7/25/00	Final Order and Award in Arbitration
8/08/00	Defendants' Motion to Remand to Arbitrator
8/10/00	Notice of Hearing
8/14/00	Plaintiffs' Objection to Defendant's Motion to Remand Case to Arbitrator
8/18/00	Order Restoring to Docket (00-CP-18-793)
8/28/00	Defendant's Motion to Vacate Award in Arbitration and Objection to Motion to Confirm Award
9/05/00	Plaintiffs' Memorandum in Support of Motion to Confirm Final Order and Award in Arbitration and in Opposition of Motion to Vacate
9/05/00	Defendant's Memorandum in Support of Motion to Vacate Award in Arbitration and Objection to Motion to Confirm Award
9/18/00	Order Confirming Award
9/18/00	Order Denying Motion to Remand to Arbitrator for Amendment and Clarification
9/29/00	Order for Supplemental Proceedings
11/13/00	Defendant's Motion for Supersedeas and Stay of Enforcement of Judgment Pending Appeal and for Approval of Supersedeas Bond
1/08/01	Order Approving Bond and Granting Supersedeas
10/16/02	Notice of Motion and Motion to Execute on Bond or Alternatively for Supplemental Surety Bond
11/27/02	Consent Order Modifying Supersedeas Bond

SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

No. 25523

LYNN W. BAZZLE and BURT A. BAZZLE,
in a representative capacity on behalf of a class
and for all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Appellant.

DANIEL B. LACKEY, GEORGE BUGGS, and FLORINE BUGGS,
in a representative capacity on behalf of a class
and for all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Appellant.

RELEVANT DOCKET ENTRIES*

DATE	PROCEEDINGS
10/12/00	Not. of App. to SC CA challenging Order of 01/02/98, supp. by Order, 01/07/98; Order deny'g Green Tree's Mot. for Recon., 03/16/98, and Order confirm. Arbit.'s award, 09/15/00

* Compiled from the pleadings on file with the Supreme Court of South Carolina.

DATE	PROCEEDINGS
10/13/00	Amend. Not. of App. to SC CA challenging Order of 01/02/98, supp. by Order, 01/07/98; Order deny'g Green Tree's Mot. for Recon., 03/16/98, Award in Arbit., 07/24/00, and Order confirm. Arbit.'s award, 09/15/00
10/18/00	Ltr from Green Tree to SC CA re: case numbers below
10/20/00	Ltr from Green Tree to SC CA re: transcripts ordered and rec'd
10/20/00	Resp's Not. of Mot. to SC Sup.Ct. and Mot. to Recall Case from the Court of Appeals
10/31/00	Resp's Fax to SC Sup. Ct. attch'g Order of 01/02/98, supp. by Order, 01/07/98; Order deny'g Green Tree's Mot. for Recon., 03/16/98, Award in Arbit., 07/24/00, Order Restoring to Dckt, 08/18/00, and Order confirm. Arbit.'s award, 09/15/00
11/02/00	App's Return to Mot. to Recall Case from the Court of Appeals
01/08/01	App's and Resp's Joint Not. of Mot. and Mot. to Consol. Record on Appeal
01/16/01	Resp's Not. of Mot. to Dismiss and supp. Mem.
01/25/01	App's Reply to Mot. for Part. Dismissal of Appeal
02/22/01	Order withdrawing appeal from S.C. CA, establishing briefing schedule, and consolidating Record on Appeal
04/26/01	Initial Br. of App.
04/26/01	App's Designation of Matter to be Included in the Record on Appeal
05/09/01	App's Mot. for Admin. Pro Hac Vice

DATE	PROCEEDINGS
06/18/01	Resp's Mot. for Ext. to File Initial Br. of Resp.
07/17/01	Am. Cur's Mot. for Admin. Pro Hac Vice
07/17/01	Am. Cur's Mot. for Leave to File Am. Cur. Br.
07/17/01	Brief of Am. Cur. Am. Bankers Assoc., Am. Fin. Servs. Assoc., Consumer Bankers Assoc., S.C. Bankers Assoc., and S.C. Merchants Assoc. in Support of App. Green Tree Fin. Corp.
07/23/01	Initial Br. of Resp.
08/01/01	App's ltr to clerk re: request for unopp. exten. of time of 45 days to file App's Reply Brs.
08/29/01	Resp's Reply Br. to Am. Cur. Filed on Behalf of the Am. Bankers Assoc., Am. Fin. Servs. Assoc., Consumer Bankers Assoc., S.C. Bankers Assoc., and S.C. Merchants Assoc.
09/19/01	Consol. Reply Br. of App.
09/19/01	App's Supp. Designation of Matter to be Included in Record on the Appeal
10/12/01	App's ltr to clerk re: request for exten. of time of 30 days to file Record on Appeal
11/20/01	Record on Appeal, vols. I-VIII served on Resp.
12/04/01	Final Br. of Resp.
12/06/01	Record on Appeal, vols. I-VIII filed w/ Court
12/06/01	Final Br. of App.
12/06/01	Final Reply Br. of App.
01/11/02	Resp's Not. of Mot. and Mot. to Expedite Hearing
01/15/02	Resp's ltr to clerk re: resp's availability for hearing in March

DATE	PROCEEDINGS
02/05/02	App's ltr to clerk re: req. for consolidation of oral argument
03/11/02	Am. Cur. National Association of Consumer Advocates Mot. for Admin. Pro Hac Vice of Michael D. Donovan and Ira Rheingold
03/11/02	Am. Cur. National Association of Consumer Advocates Mot. for Leave to File Br. of Am. Cur.
03/14/02	Oral Argument set for 03/21/02; 15 min. allotted to each side w/ five min. in reply in each case
03/18/02	App's ltr to clerk re: req. for consolidation of oral argument
03/20/02	Argument time to remain 15 min. per side for each case.
03/21/02	Br. of Am. Cur. National Association of Consumer Advocates in Support of Resp.
03/21/02	Oral Argument
03/28/02	Resp's ltr to clerk re: req. for tape of oral argument
07/11/02	Resp's Amend. Mot. for Admin. Pro Hac Vice of Michael D. Donovan
07/17/02	App's ltr to clerk neither opposing nor consenting to Resp's Amend. Mot. for Admin. Pro Hac Vice of Michael D. Donovan
08/26/02	Opinion of Court filed
10/31/02	U.S. Sup. Ct. Clerk's ltr to clerk re; petition for certiorari filed w/ U.S. Sup. Ct. 10/23/02, and placed on U.S. Sup. Ct. docket 10/25/02 as No. 02-634

DATE	PROCEEDINGS
01/30/03	U.S. Sup. Ct. Clerk's ltr to clerk re; petition for certiorari granted for 02-634 on 01/10/03

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

IN ARBITRATION

DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS, MICHAEL HIGHSMITH, AND PAULA JOHNSON,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION,
Defendant.

MEMORANDUM OF GREEN TREE FINANCIAL CORPORATION

INTRODUCTION

This memorandum is submitted on behalf of the Defendant Green Tree Financial Corporation (hereinafter Green Tree). The purpose of this memorandum is to address the single issue of whether an arbitration may proceed as a class action in the absence of specific language in the arbitration agreement permitting class treatment in arbitration. Additional issues concerning class certification under Rule 23 and questions of the necessity for class treatment are reserved to be addressed at a later time if necessary.

Arbitration was compelled in this case pursuant to the Federal Arbitration Act (FAA) 9 USCA §1 et. seq. Green Tree submits that federal law interpreting the FAA controls this issue and preempts state law or regulation to the contrary. Green Tree submits further that the principle has been well established in the federal decisions dealing with or related to

the issue that the parties may not be subjected to state class action procedures in arbitration unless the arbitration agreement expressly permits class treatment in arbitration.

STATEMENT OF FACTS

Green Tree is a financial services company doing business nationwide. From the complaint it appears that the Plaintiffs Highsmith, Johnson and Buggs are all individuals who financed the purchase of mobile homes. The Plaintiff Lackey financed home improvements. The consumer financing paper in each transaction was assigned to Green Tree. Each of the transactions involved a mortgage on real property in South Carolina. However, the Highsmith and Lackey transactions took place in Georgia. The other transactions took place in South Carolina.

Each of the named Plaintiffs executed a Retail Installment Sales Contract which included an agreement to submit all claims to arbitration. While the wording of the agreements were not identical, they each required arbitration and none of the arbitration agreements permit class treatment in arbitration. Attached hereto for the arbitrators convenience are affidavits filed with the Court in connection with previous proceedings identifying the financing agreements.

Green Tree moved in the Circuit Court to stay the litigation and compel arbitration. The motion to compel arbitration was denied. On appeal the Circuit Court's order was reversed by the Court of Appeals. The case was remanded to the Circuit Court for further proceedings.

SUMMARY OF ARGUMENT

1. The FAA supersedes state law and procedure and requires the enforcement of arbitration agreements according to their terms and no more, notwithstanding state law or procedure to the contrary.

* * * *

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C/A No. 96-CP-06-073
IN ARBITRATION

DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS,
MICHAEL HIGHSMITH AND PAULA JOHNSON,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION,
Defendant.

NOTICE OF CLASS ACTION

TO: ALL PERSONS WHO OBTAINED A LOAN OR CREDIT SALE SECURED BY REAL ESTATE IN SOUTH CAROLINA IN THE NAME OF GREEN TREE, BY WAY OF ASSIGNMENT, ORIGINATION, OR OTHERWISE, AFTER JULY 1, 1982 AND WHO MADE A PAYMENT ON SUCH LOAN ON OR AFTER MAY 28, 1993 (THE "CLASS").

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY PROCEEDINGS IN THIS LITIGATION.

1. NOTICE IS HEREBY GIVEN that Daniel B. Lackey, George Buggs, Florine Buggs, Michael Highsmith, and Paula Johnson, the individual plaintiffs named above (the "Named Plaintiffs") have filed an action (the "Action") in the

Court of Common Pleas for Barnwell County (the "Circuit Court") on behalf of themselves and all other members of the Class.

2. By Order of the Circuit Court, this case was submitted to binding arbitration and The Honorable Thomas J. Ervin was appointed as the arbitrator. On December 1, 1998, Arbitrator Ervin ruled that the Action should be maintained as a class action under the provisions of Rule 23 of the South Carolina Rules of Civil Procedure and approved the Named Plaintiffs as the Class Representatives

3. This Notice is not to be construed as an expression of any opinion by the Arbitrator with respect to the merits of the respective claims or defenses of the parties. Rather, this Notice is sent merely to inform you that this Action is pending and to advise you of the rights you have with respect to this Action

I. BACKGROUND OF THE ACTION

4. In May 1996, the named Plaintiffs began this law suit by filing and serving a Summons and Complaint against Green Tree Financial Corporation ("Green Tree" or the "Defendant"). In the Complaint, the Named Plaintiffs allege that Green Tree violated the South Carolina Consumer Protection Code. The Consumer Protection Code Section 37-10-105 imposes penalties on lenders who fail to timely ascertain the preference of a borrower as to the lawyer who would represent him or her in connection with the closing of a real estate secured credit sale or loan transaction and the preference of the borrower as to an insurance agent who would supply property insurance in connection with the lien.

5. Green Tree has denied, and continues to deny any wrongdoing and denies any liability to the Named Plaintiffs or to any member of the Class.

II. CURRENT STATUS

6. As stated previously the Arbitrator has just recently granted class certification. This case is now proceeding through the notice and opt out proceedings. Also, during this time the Named Plaintiffs are preparing for a final hearing on the merits. The Class as currently certified includes all of the individuals:

> (a) who entered into a loan or credit sale transaction after July 1, 1982, in the name of Green Tree, by way of assignment, origination, or otherwise, for personal, family, or household purposes who executed mortgages or any other liens secured in whole or in part by real estate in South Carolina; and
>
> (b) a payment was made within three (3) years of May 28, 1996; and
>
> (c) the transaction documents contain an arbitration clause; however,
>
> (d) excluding retail installment contracts for home improvements that were secured by a mortgage lien on which payment has been made within three years of March 25, 1997.

7. The Arbitrator has not yet issued an order that sets the time frame for this case to go to a final arbitration hearing.

III. OPTIONS AVAILABLE TO CLASS MEMBERS

8. You have a choice whether or not to remain a member of the Class on whose behalf this suit is being maintained. Either choice will have consequences that you should understand before making your decision.

9. Upon written request from a Class Member, the Arbitrator, will exclude any member of the Class to whom this Notice is addressed. If you exclude yourself from the Class, you will not be bound by any decision, judgment or

order in the above-captioned Action. Persons who request such exclusion will not be entitled to share in the benefits of any settlement or judgment if it is favorable to the Class, and will not be bound by the settlement or judgment if it is adverse to the Class.

10. Any Class member who does not request to be excluded will *automatically* be included in this Action as members of the Class represented by the Named Plaintiffs. All members of the Class will also be bound by the orders entered and notices hereafter given in this Action.

11. If you wish to remain in the Class, no action is required on your part.

12. If you desire to be excluded from the Class, you *MUST* file a Request for Exclusion with the Office of Bradford P. Simpson, Columbia, South Carolina (Mailing address: Post Office Box 8, Columbia, South Carolina 29202) on or before June 23, 1999. Any Request for Exclusion must be *received* by Mr. Simpson no later than 5:00 p.m. E.S.T. on June *25,* 1999. A Request for Exclusion form may be obtained from the lawyers listed in Paragraph 13.

13. Requests for Exclusion forms that remove you from the Class must be served upon:

FOR THE CLASS:
Bradford P. Simpson, Esquire
B. Randall Dong, Esquire
SIMPSON & DONG, LLC
Post Office Box 8
Columbia, South Carolina 29202-0008

FOR GREEN TREE:
Herbert W. Hamilton, Esquire
KENNEDY, COVINGTON, LOBDELL
& HICKMAN
Post Office Box 11429
Rock Hill, South Carolina 29731

IV. APPEARANCE BY COUNSEL

14. If you choose, you have the right, but are not required, to enter an appearance through an attorney of your choice. Your attorney should mail a Notice of Appearance to the attorneys listed in Paragraph 15 below. *If you do not enter an appearance through your own attorney, your interests will be represented by the attorneys for the Named Plaintiffs whose names are listed in Paragraph 16.*

15. Notice of Appearance by your attorney must be served upon:

FOR THE CLASS:
Bradford P. Simpson, Esquire
B. Randall Dong, Esquire
SIMPSON & DONG, LLC
P.O. Box 8
Columbia, South Carolina 29202-0008

FOR GREEN TREE:
Herbert W. Hamilton, Esquire
KENNEDY, COVINGTON, LOBDELL
& HICKMAN
Post Office Box 11429
Rock Hill, South Carolina 29731

16. Counsel for the Named Plaintiffs and for members of Class ("Class Counsel) are as follows:

SIMPSON & DONG, LLC
Bradford P. Simpson, Esquire
B. Randall Dong, Esquire

BEARD LAW OFFICES
T. Alexander Beard, Esquire

TERRENI LAW FIRM
Charles L.A. Terreni, Esquire

SUGGS & KELLY
LAWYERS, P.A.
D. Michael Kelly, Esquire
John D. Kassel, Esquire
Kelli L. Sullivan, Esquire

BEDINGFIELD & WILLIAMS
Daniel W. Williams, Esquire

RICHARDSON, PLOWDEN
CARPENTER &
ROBINSON, P.A.
Steven W. Hamm, Esquire
Mary S. League, Esquire

DIBBLE LAW OFFICES
Charles L. Dibble, Esquire

C. RICHARD KELLY, P.C.
C. Richard Kelly, Esquire

DROSE LAW FIRM
Thomas M. Fryar, Esquire.

MARY LEIGH ARNOLD, P.A.
Mary Leigh Arnold, Esquire

IV. ADMINISTRATIVE MATTERS

17. All documents which you file should be entitled "*Lackey, et al., v. Green Tree Financial Corporation.*" as shown in the caption above and, at a minimum, should include the case file number, Civil Action No. 96-CP-06-073. The date and time of actual receipt by the attorneys listed in Paragraphs 13 and 15 will determine whether any documents you may file or serve meet the time limit requirements.

18. You should call *1-800-772-0582 (toll free)* with any and all questions concerning this Notice and one of the attorneys for the Class will respond to you. The pleadings and other papers filed in this Action are available for inspection in the Office of Simpson & Dong, LLC in Columbia, South

Carolina. *PLEASE DO NOT CALL THE CIRCUIT COURT, THE ARBITRATOR, OR THE OFFICE OF THE CLERK OF COURT.*

19. If your address changes or is different from the address stated on the envelope enclosing this Notice, you should immediately inform the attorneys listed in Paragraph 13.

20. Although there has been a determination by the Arbitrator that this law suit may continue as a class action, the Arbitrator has not made any decision on the merits of the case. Whether or not the Named Plaintiffs will prevail, has not been decided.

21. CLASS COUNSEL HAVE REQUESTED THAT THE ARBITRATOR INCLUDE IN THIS NOTICE THE FOLLOWING STATEMENT FROM CLASS COUNSEL:

"BECAUSE THE OUTCOME OF ANY LAWSUIT IS ALWAYS UNCERTAIN, CLASS COUNSEL ADVISE ALL MEMBERS OF THE CLASS TO CONTINUE MAKING THEIR REGULAR MONTHLY PAYMENTS TO GREEN TREE."

V. SPECIAL NOTICE TO CLASS MEMBERS IN BANKRUPTCY

22. All members of the Class who have filed bankruptcy since their loan or credit sale closing should provide their bankruptcy attorney with a copy of this Notice.

BY ORDER OF THE ARBITRATOR

/s/ Thomas J. Ervin, Arbitrator
THOMAS J. ERVIN, ARBITRATOR

February 15, 1999

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

IN ARBITRATION

DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS, MICHAEL HIGHSMITH, AND PAULA JOHNSON,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION,
Defendant.

CONSENT ORDER FOR BIFURCATION

This matter came before me for a hearing on January 28, 2000. Present at the hearing were counsel for the Plaintiffs and counsel for the Defendant. There were several issues heard at that time. It was determined that the parties could agree to the following:

1. Green Tree's consent to this order is subject to the ongoing objection to the arbitrator's authority to compel class treatment in this arbitration.

2. All class members whose contract is dated after September 25, 1995 will be bifurcated out for arbitration at a later date if necessary. Further investigation is necessary before it can be determined if these individuals may proceed with their claims and thus are being bifurcated out of this arbitration which is currently scheduled for the week of March 6, 2000. All motions filed by both parties are reserved for later determination.

3. All class members who have a home improvement contract secured by real estate will be bifurcated out for arbitration at a later date subject to pending motions.

4. The parties understand that the motions in the Bazzle case will be heard at a later date. At that time, the arbitrator will decide whether the home improvement portion of the Lackey case, which includes the named plaintiff Lackey, will be consolidated with the Bazzle case.

IT IS SO ORDERED.

/s/ Thomas J. Ervin Arbitrator
THOMAS J. ERVIN
ARBITRATOR

March 2, 2000

WE CONSENT:

/s/Bradford P. Simpson
BRADFORD P. SIMPSON
SUGGS & KELLY LAWYERS, P.A.
P.O. Box 8113
Columbia, SC 29202
ATTORNEYS FOR THE PLAINTIFFS

/s/Herbert W. Hamilton
HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731
ATTORNEYS FOR THE DEFENDANT

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
CIVIL ACTION NO. 00-CP-18-443
F/K/A C/A NO. 97-CP-18-258

LYNN W. BAZZLE and BURT A. BAZZLE,
in a representative capacity on behalf of a class and for all others similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO CONFIRM FINAL ORDER AND AWARD IN ARBITRATION AND IN OPPOSITION OF MOTION TO VACATE

The Plaintiffs, in their individual and representative capacities, submit by and through their undersigned attorneys, this Memorandum of Law in support of their Motion to Confirm Final Order and Award in Arbitration filed on July 25, 2000 and in opposition to Defendants' Motion to Vacate Arbitrator's Award filed on August 24, 2000.

PROCEDURAL HISTORY

On March 25, 1997, Burt and Lynn Bazzle commenced an action against Green Tree and Patton General Contracting (hereinafter "Patton") in the Court of Common Pleas, Dorchester County, South Carolina (formerly Civil Action

No. 97-CP-18-258, now Civil Action No. 000-CP-18-443), arising out of a home improvement financing agreement. The Complaint includes causes of action for unconscionable conduct and violation of the attorney and insurance preference provision of the South Carolina Consumer Protection Code.

On April 21, 1997, the Bazzles filed an Amended Complaint, which incorporated class action allegations. On the same day, the Bazzles filed a Motion for Class Certification. On May 21, 1997, Green Tree filed an Answer to the Amended Complaint and filed a Motion to Compel Arbitration.

On December 5, 1997, The Honorable Patrick R. Watts, Master-In-Equity, sitting as Special Circuit Court Judge, heard and ruled on the Bazzles' Motion for Class Certification and Green Tree's Motion to Compel Arbitration. The Motion for Class Certification was filed and heard first. After the Motion for Class Certification was granted, Green Tree prosecuted its Motion to Compel Arbitration. Two (2) separate formal Orders memorializing the Rulings of December 5, 1997 were filed: (1) an Order Granting Class Certification; and (2) an Order granting Green Tree's Motion to Compel Arbitration. On January 7, 1998, a Supplemental Order to the Order Granting Class Certification correcting a scrivener's error was filed.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the Court's Order granting class certification. On February 24, 1998, a hearing was held on Green Tree's Motion for Reconsideration. On March 17, 1998, Green Tree's Motion for Reconsideration was denied. On or about April 1, 1998, Green Tree filed a Notice of Appeal.

Shortly after receiving Green Tree's Notice of Appeal, the Clerk of the Court of Appeals wrote to counsel of record inquiring as to the appropriateness of the appeal. The Bazzles

responded to the inquiry by filing a Motion to Dismiss on the grounds that the appeal was interlocutory.

On April 28, 1998, the Court of Appeals entered an Order dismissing the appeal on the ground that an Order granting class certification is interlocutory and non-appealable. On or about May 7, 1998, Green Tree filed a Petition for Rehearing. On June 12, 1998, the Court of Appeals denied Green Tree's Motion for Reconsideration.

On June 24, 1998, Green Tree filed a Petition for Writ of Certiorari. On February 9, 1999, the South Carolina Supreme Court dismissed Green Tree's Petition for Writ of Certiorari and remitted the case to the Clerk of Court for Dorchester County.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of Arbitrator. On or about May 6, 1999 Green Tree filed a Motion to Dismiss. The grounds for the Motion to Dismiss were the filing of foreclosure proceedings against the Bazzles by their first mortgage holder and the filing for relief by the Bazzles under Chapter 13 of the United States Bankruptcy Code. On May 20, 1999, the Plaintiffs filed opposition to the Motion to Dismiss. On May 20, 1999, a hearing was held for the purposes of hearing the Bazzles' Motion to Compel the Appointment of an Arbitrator and Green Tree's Motion to Dismiss. On June 2, 1999, the Order Appointing the Honorable Thomas J. Ervin Arbitrator was filed with the Dorchester Clerk of Court. (Judge Ervin had previously been appointed to act as Arbitrator in the related case of *Lackey v. Green Tree Corporation*, Civil Action Number 96-CP-06-073.).

On January 26, 2000, pre-trial conference was held in the *Lackey* case. At the pre-trial conference Green Tree requested that all home improvement transactions included with the *Lackey* case be removed and consolidated with the within action. The Arbitrator granted Green Tree's request.

On or about March 16, 2000, Green Tree resubmitted its Motion to Dismiss to the Arbitrator due to the Bazzles filing for bankruptcy. On March 23, 2000, a hearing was held at which time the Motion to Dismiss was denied. Green Tree also argued at the time of the hearing that the causes of action in the Complaint should be limited to those relating to violations of the South Carolina Protection Code and that Patton General Contracting should be removed as a Defendant. At Green Tree's insistence, a Bifurcated Second Amended Complaint in Arbitration against Green Tree alone, including class action allegations, was served on March 27, 2000.

The Second Amended Complaint sets forth two causes of action: (1) violation of the South Carolina attorney/insurance preference statute, §37-10-102 *et. seq.*; and (2) unconscionable conduct in violation of §37-10-105. On April 11, 2000, Green Tree filed its Answer.

On May 31, 2000, a hearing was held before the Arbitrator on all home improvement transactions, including the *Lackey* home improvement transactions. The entire *Lackey* trial record was made part of the record in this matter. On July 24, 2000, the Arbitrator executed a written Award providing as follows:

> Based upon carefull review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, reckless, wanton and egregious, and therefore, awarded Plaintiffs the sum of $10,935,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in the amount of $18,252.00, which is one half of $36,504.00.

I further conclude that a reasonable attorney's fee of $3,645,500.00 should be awarded to members of the Plaintiffs' class.

STANDARD OF REVIEW

Plaintiffs' Motion to Confirm should be granted since Green Tree has failed to comply with the strict standards applicable to its Motion to Vacate. In order to prevail in its motion to vacate the arbitration award in this case, Green Tree must bear an extraordinary burden.

* * * *

1. THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW.

In order for the Arbitrator to have manifestly disregarded the law, he must have been conscious of the law and deliberately ignored it. *Brown v. ITT Consumer Financial Corp.*, Op. No. 99-10506 (11th Cir., May 5, 2000), citing *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997). Defendants bear the burden of asserting sufficient grounds to vacate the award. *Id.*

The Defendants have failed to meet their burden. Defendants do not assert that any decision made by Judge Ervin was an *intentional* error or a *conscious decision* not to follow the appropriate legal standard. (emphasis added). Defendants have not asserted that Judge Ervin understood and correctly stated the law, but proceed to disregard the same. At best Defendant's grounds are an assertion that the Arbitrator did not follow the reason they offered and argued. A review of the Arbitrator's Order illustrates that the Arbitrator's decision was well reasoned and based on applicable law and the facts of the case. Thus each of Defendants asserted particulars based on a theory of manifest disregard of the law fail because they do not set forth a sufficient basis to support a theory of manifest disregard of the law. See

Upshur Coals Corp. v. United Mine Workers, 933 F.2d 225, 229 (4th Cir. 1991). This Court does not have the authority review the Arbitrator's decision and vacate the decision to impose its beliefs. The motion to vacate for the reasons asserted by Defendants must be denied.

2. GREEN TREE INCORRECTLY IMPLIES THAT THE ARBITRATOR DETERMINED THE MATTER COULD PROCEED AS A CLASS ACTION.

The first numbered particular set forth by the Defendants reads as follows: "The Arbitrator did not have authority to determine whether this case could proceed as a class action in arbitration. Decisions concerning the scope of the arbitration cause are for the Court and not the arbitrator."

As this Court will recall this Court determined in this matter that the matter could proceed as a class action. The determination was not initially made by the Arbitrator. The Arbitrator received [Page 8] the case as a class action. Thus, this argument made by the Defendants is inappropriate here.

Furthermore, the Court will recall that when the initial determination was made, the Defendants sought reconsideration of the issue and appealed the decision. The decision by this Court is therefore the law of the case at this posture and cannot be reviewed by this Court. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay and Guerard*, __ S.C. __, 513 S.E.2d 96 (1999). If any review of this issue is appropriate, it is for the appellate courts.[2]

---

[2] To ensure that the Plaintiffs' position is clear, they do not agree with the Defendants position that the determination of whether the case could proceed as a class action could not be made by the Arbitrator. Plaintiffs believe that based on the language of the subject arbitration clause, the facts surrounding the matter and certain legal authority, the Arbitrator did have the right to determine if the case could proceed as a class action. Based on the posture in which the Arbitrator received this case, this issue

3. THE ARBITRATOR'S AWARD CANNOT BE VACATED FOR AN ALLEGED VIOLATION OF DUE PROCESS.

The third group of particulars, numbers 8, and 12 do not specify a recognized basis for vacating an award under §10 of the Federal Arbitration Act. Particular numbers 8 and 9 read respectively:

> The amount of the Arbitrator's award constitutes the imposition of an excessive fine in violation of the Due Process provisions of both the South Carolina and United States Constitution.
>
> and,
>
> The Arbitrator's award violates the Due Process clause of the Fourteenth Amendment of the United States Constitution.

Defendants generically claim a due process violation but the genesis for the claim is unclear. Notwithstanding, such an argument has been rejected by the Fourth Circuit. See, *Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231 (4th Cir. 1998). In *Gallus* the moving party to

* * * *

---

should not be addressed here. Furthermore, to the extent that Judge Ervin made such a decision, if any, in this case or the *Lackey* case, it was a reaffirmation and/or adoption of this Court's prior determination. Finally, it must be noted that the decision of the Arbitrator in *Lackey* that it could appropriately proceed as a class action was affirmed by Judge Clarey in the case of *Green Tree Financial Services, Inc. v. Lackey*, Civil Action 98-CP-06-278, brought by Green Tree in Barnwell County to enjoin the arbitrator from proceeding as class action.

HI-RIC

GT-15-41-010 (11/82)

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT

No.
Date May 20, 1985

Appl # 1638736

Buyer
Burt A Bazzle
Lynn W Bazzle
367 Pinehurst Ave

Summerville, SC 29483

"You" and "your" means each Buyer above and guarantor, jointly and severally.

Seller
FALTON GENERAL CONTRACTING
(MASTER ACCOUNT)
121 CENTRUM DR STE 13
LMD, SC 29063

"We" and "us" means the Seller above, its successors and assigns.

SALE. You agree to purchase the property (and/or services) described below according to the following terms, including those on the reverse side.

You agree to pay us the principal sum of FIFTEEN THOUSAND ONE HUNDRED THIRTY SIX AND 80/100 dollars ($ 15136.80) plus interest from the disbursement date at the rate of 12.75 % per year until paid in full. You will pay the total amount due in 180 installments of $ 199.93, each, beginning SEE BELOW, 19 and continuing on the same day of each Month thereafter until paid in full.

If your first payment date is more than thirty days from the date of consummation, you agree that any accrued interest (which will not be paid with your first payment) will be added to your principal balance as a deferred charge and that interest shall be calculated upon such deferred charge at the contract rate over the loan term.

PREPAYMENT: You may prepay this contract in full at any time.

LATE CHARGE: You agree to pay a late charge when an installment is not paid within days after it is due. This charge will be % of the unpaid portion of the installment or $ N/A, whichever is less. However, the charge will not be less than $ N/A.

You also agree that we may change these amounts pursuant to 69-37-2-203 and 37-1-301 of the South Carolina Consumer Protection Code so as to always be the maximum amounts allowed by law.

DESCRIPTION OF GOODS AND/OR SERVICES AND SECURITY AGREEMENT. Here is a description of the goods and/or services you are purchasing. To secure the payment of this contract, you give us a security interest in the goods plus all accessions, attachments, accessories and replacement, plus all proceeds (except cash) from all of these. You also agree to give us a separate mortgage (or deed of trust) on the real property described below.

INSTALLATION OF:	DESCRIPTION OF GOODS/SERVICES	ITEM NUMBER:
	Windows	
	Soffit, Fascia	

REAL PROPERTY ADDRESS:
367 Pinehurst Ave Summerville SC 29483

WARRANTIES: WARRANTY INFORMATION IS SUPPLIED TO YOU SEPARATELY.

LOCATION: The goods and services installed will be located at the real property address listed above.

You will furnish to us, at our request, a disclosure signed by all persons having an interest in the above described real estate of any right, title or interest so as to bind upon that property prior to the security interest created by this contract.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you or on your behalf.	TOTAL OF PAYMENTS The amount you will have paid when you have made all scheduled payments.	TOTAL SALE PRICE The total cost of your purchase on credit, including your down payment of $ .00
13.93 %	$ 24829.00	$ 15000.00	$ 35829.00	$ 35829.00

Your Payment Schedule will be:	Number of Payments	Amount of Payments	When Payments Are Due
	180	$ 199.05	Monthly Beginning Approximately 30 Days From Disbursement Date, 19

Security: You are giving a security interest in: (Brief description of other property)
[X] the goods or property being purchased.
[ ] the real property where the improvements are made.

Late Charge: You will be charged a late charge when an installment is not paid within days after it is due. This charge will be % of the unpaid portion of the installment, or $ N/A, whichever is less. However, the charge will not be less than $ N/A.

These amounts may change pursuant to 69-37-2-203 and 37-1-301 of the South Carolina Consumer Protection Code.

Prepayment: If you pay off this contract early, you may [ ] will not have to pay a penalty. Filing fees $ 25.00

You can see your contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties. "I" means each Buyer.

CREDIT INSURANCE

CREDIT LIFE INSURANCE AND CREDIT DISABILITY INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT, AND WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL COSTS.

Type	Premium	Term
Credit Life	.00	0
Credit Disability	.00	0
Joint Credit Life	.00	0

You [ ] do [X] do not want credit life insurance.
X N/A

You [ ] do [X] do not want credit disability insurance.
X N/A

You [ ] do [X] do not want joint credit life insurance.
X N/A
XX N/A

PROPERTY INSURANCE

You may obtain property insurance from anyone that is acceptable to us. If you get the insurance from or through us you will pay $ .00 for NONE of coverage.

The property insurance premium is calculated as follows:

Fire Theft and Combined Add'l. Coverage	$ .00
	$ .00
	$ .00
	$ .00

The above insurance does not include liability insurance coverage for bodily injury and property damage unless such insurance is specifically described above.

ASSIGNMENT

Seller assigns this contract on , 19 to GREER TRUE FINANCIAL CORP. in accordance with the Seller's Assignment Agreement on the reverse side. The assignment is [ ] Without Recourse [ ] With Recourse [ ] Subject to a Separate Agreement.

X (Seller)
By Title

ITEMIZATION OF AMOUNT FINANCED

1. Cash Price (including Sales Tax)	$	15000.00
2. Cash Down Payment	$	.00
3. Unpaid Balance of Cash Price (1 minus 2)	$	15000.00
4. Other Charges:		
(a) To Insurance Companies	$	.00
(b) To Public Officials	$	25.00
(c) To Inspector	$	25.00
(d) To Appraiser	$	.00
(e) Property Report	$	90.00
(f) Processing Fee	$	.00
(g)	$	
(h) Discount Points	$	
(i) To Green Tree	$	.00
(j)	$	
(k)	$	
(l)	$	
5. Subtotal (3 plus 4(a) through 4(l))	$	15136.80
6. Prepaid Finance Charges:		
(a) Prepaid Fees	$	136.80
(b)	$	
(c)	$	
7. Amount Financed (5 minus 6(a) through 6(c))	$	15000.00

NOTICE TO BUYER: (1) Do not sign this contract before you read it or if it contains any blank spaces. (2) You are entitled to an exact copy of the contract you sign. (3) Under the law you have the right, among others, to pay in advance the full amount due, and to obtain under certain conditions a partial refund of the finance charge. (4) This contract shall become effective only when signed and executed by the buyer and seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of both parties to this contract.

BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS RETAIL INSTALLMENT CONTRACT

1. Signed X Burt A Bazzle Buyer
2. Signed X Lynn W Bazzle Buyer

YOU ALSO AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS CONTRACT.

Signed X For Seller
Title

White First Copy-Lender Green Second Copy-Regional Office Canary Third Copy-Buyer Pink Fourth Copy-Seller Goldenrod Fifth Copy-Extra

GT-15-41-010 (11/82)

EXHIBIT
A

BEST AVAILABLE COPY

ADDITIONAL TERMS OF THE CONTRACT AND SECURITY AGREEMENT

GENERAL TERMS - As used in this document, "contract" includes the terms of the security agreement. You have been given an opportunity to examine the property and/or services for the trade-in allowance, cash price or the total sale price, which is the total price of the property and/or services if you buy it over time. The total sale price disclosed in the contract has the total sale or lease on the front side is based on the terms as of the date and the assumption that all payments will be made as scheduled. The actual total sale price may be more or less than the amount disclosed depending on your payment amount. You agree to buy the property and/or services appears at the actual total sale price according to the terms of this contract.

You agree this contract will be governed by the Law of the State of South Carolina, including the Uniform Commercial Code, if applicable. You agree that this and any other written agreement pertaining to this sale contains all of the terms and provisions of your agreement with us and that we have not made any oral warranties or promises regarding the secured property. This contract takes effect when signed by you.

Any term of this contract which does not comply with applicable Law will not be effective if that Law does not expressly or explicitly permit variations by agreement. If any part of this contract or security agreement cannot be enforced according to its terms, this fact will not affect the balance of the contract and security agreement.

You agree to pay us all allowable charges for the return by a depository institution of a dishonored check or other negotiable instrument to the full extent permitted by applicable law.

You agree to cooperate with us in executing any requests after closing to correct errors made concerning this contract or the transaction and to provide any and all additional documentation deemed necessary by us to complete this transaction. You agree that we may enforce this agreement by judicial process and are entitled to attorney's fees, costs and disbursements incident to such enforcement.

INTEREST - Interest accrues on the unpaid balance of your loan amount remaining from time to time, until paid in full. Each payment will be first applied to accrued interest up to the time the payment is actually made, then to principal. The actual amount of your total payment may be more or less than the amount scheduled, depending on your payment amount.

OWNERSHIP AND DUTIES TOWARD PROPERTY - By giving us this security interest, you represent and agree:

(a) you will defend this property against any claim made by anyone else, and will do whatever is necessary to preserve our status in the property;

(b) you have signed or immediately will sign any additional documents or provide us with any additional information we may require to perfect and preserve our priority in this property. You will not hesitate do anything to defend our position;

(c) you will keep the property in your possession in good condition and repair, and use it only for the lawful purposes for which it was intended. Unless otherwise agreed in writing, the property will be installed at the address listed on the front side of this form;

(d) you will not attempt to sell the property or otherwise transfer any rights in this property to anyone else;

(e) you will pay all taxes and assessments on the property as they become due;

(f) you will provide us reasonable access to the property for the purpose of inspection, and notify us of any loss or damage; and

(g) we may pay taxes, assessments, or other liens or make repairs to the property if you have not done so. We are not required to do so, however, if we do, the amount we pay will be added to the secured obligations, will be immediately due, and will accrue interest at the rate in effect from time to time, until paid in full.

DEFAULT - You will be in default on this contract if any one or more of the following occurs (except as prohibited by law):

(a) you fail to make a payment as required by this agreement;

(b) the property or payment, performance or obligation on collateral is superior/only engineered; or

(c) you default under the terms of the mortgage or deed of trust which secures this contract.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES - If you are in default on this contract for 10 or more days because of a failure to make a required payment we must provide you with a written notice of your default and right to cure. You have 30 days after we mail or personally deliver this notice to you in which to cure the default. We may exercise our remedies after such a default only if you fail to cure the default within such time period.

However, no notice of default and right to cure is necessary and we may immediately exercise our remedies if your failure constituted your failure on this contract and have been given a notice of default and right to cure with respect to such default. This first paragraph does not apply if your contract is unsecured, unless a co-signature.

Except as otherwise limited above, if you are in default on this contract, we have all of the remedies provided by law and this contract. We may, after notice as required by law:

(a) accelerate the due date of the contract, making all unpaid principal, accrued interest, and all other agreed charges due;

(b) require you to surrender the property and make it available to us at a place we designate that is reasonably convenient to you and us;

(c) after notice as required by law, foreclose upon the property. We may then sell the property and apply the proceeds as provided by law to our expenses and then toward your secured obligations. Expenses include our cost of foreclosure, cost of holding the property, attorneys' fees (where permitted), repairs (if necessary) and costs of sale; and

(d) be entitled to a deficiency judgment against you if the proceeds of the sale do not pay all of the expenses and secured obligations (except where prohibited by law).

By choosing any one or more of these remedies, we do not waive our right to later use any other remedy. We do not waive a default if we choose not to use any remedy and, by electing not to use any remedy, we do not waive our right to later consider the event a default and to immediately use any remedies if it continues or occurs again.

You agree that if any notice is required to be provided to you of the intended sale or disposition of the property, this notice will be considered reasonable if provided by mail addressed to you at the address listed on the front side of this contract, and mailed to you at least 10 days before the date of the intended disposition (or such other period of time as is required by law).

OBLIGATIONS INDEPENDENT - Each buyer or guarantor who signs this contract agrees jointly and severally to pay it according to its terms. This means that:

(a) you must pay this contract even if someone else has signed it;

(b) we may release any co-buyer or guarantor and you will still be obligated to pay the contract;

(c) we may release any security and you will still be obligated to pay the contract;

(d) waiver by us of any of our rights will not affect your duty to pay this contract; and

(e) extending new credit or renewing this contract will not affect your duty to pay this contract.

ARBITRATION - All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN).** The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything herein to the contrary, we retain an option to use judicial or non-judicial relief to enforce a security interest in real or personal property, including foreclosure, repossession, and self-help remedies. Such actions do not waive our right to compel arbitration. Neither a request to a court to obtain provisional remedies such as injunctive relief, claim and delivery, attachment or the appointment of a receiver, nor an action for judicial relief in connection with a foreclosure of a mortgage or deed of trust, shall be deemed a waiver of the right of either party to compel arbitration of any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

Form 5419 (9-85) SC DS/DS

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

INSURANCE - You agree to purchase insurance on the secured property against such risks and in such amounts as we may reasonably require. In addition, you agree as follows:

(a) you will arrange for us to be named mortgagee or beneficiary under a standard loss payable clause on any such policy so that any benefits arising from the insured risks will first be paid to us for application toward the secured obligations;

(b) you agree that we may, in the event of a loss, require additional security or assurances of payment of the secured obligations as a condition of permitting any insurance benefits to be used for repair or replacement of the property;

(c) you agree to purchase insurance from a company that is authorized to do business in South Carolina and that is reasonably acceptable to us;

(d) you will maintain this insurance until all the secured obligations are paid in full; and

(e) if you fail to obtain or maintain this insurance, or you fail to arrange for us to be named as mortgagee or beneficiary under a standard loss payable clause, we may (but in no event are required to) purchase such insurance which will secure only our interest in the property. The amount we pay for such insurance will be added to the secured obligations, will be immediately due and will earn interest at the rate in effect from time to time, until paid in full.

WAIVER - You waive (to the extent permitted by law) demand, presentment, notice of acceleration, notice of intention to accelerate, protest, notice of dishonor and notice of protest.

COSTS OF COLLECTION AND ATTORNEYS' FEES - You agree to pay the reasonable attorneys' fees we incur (not in excess of 15% of the unpaid debt) if we hire an attorney to collect this contract in the event of your default, plus any other costs we incur to realize upon any security.

GUARANTEE - You guarantee the payment of this contract. You also agree that all the other terms of the contract will apply to you.

NAME _____

X _____

THIRD PARTY AGREEMENT

By signing within this enclosure, you agree to give us a security interest in and lien on the property that is described on the front side. You agree to be bound by the terms of this contract and security agreement and, regardless of any provision to the contrary contained herein, not to be liable for any payments it requires. You agree that we may, without releasing you or the property from this Third Party Agreement and without notice or demand upon you, renew, extend or change any term of this contract and security agreement, or take or release other security (including guarantees) for the obligations of any buyer.

You acknowledge receipt of a completed copy of this contract and security agreement.

Date: _____, 19 _____

X _____

Name _____

ASSIGNMENT BY SELLER

Seller sells and assigns to assignee (whose name is printed on the face of this contract) its successors and assigns, all its rights, title and interest in the retail installment contract, and any guarantee executed in connection with this contract. Seller gives assignee full power, either in its own name or as Seller's name, to take all legal or other actions which Seller could have taken under this contract.

Seller warrants:

(a) this contract represents a sale by seller to buyer on a time price basis and not on a cash basis;

(b) that all of the terms of this contract are set forth on this document;

(c) the statements contained in this contract are true and correct;

(d) the down payment was made by the buyer in the manner stated on the face of this contract and no part of the down payment was loaned or paid to the buyer by seller or seller's representatives;

(e) the sale was completed in accordance with all laws and regulations affecting this sale, including, but not limited to, the Federal Truth-in-Lending Act, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Federal Equal Credit Opportunity Act, the Federal Trade Commission Act, and any regulations pertaining to these Laws;

(f) that all disclosures made in this contract under federal and state laws have been properly made under these laws;

(g) the buyer was not a minor and had the capacity to enter into this contract;

(h) this contract is valid and enforceable in accordance with its terms;

(i) the names and signatures on this contract are not forged, fictitious or assumed, and are true and correct;

(j) this contract is not subject to any claims or defenses on the part of the buyer;

(k) a completely filled-in copy of this contract was delivered to the buyer at the time of execution;

(l) the property has been delivered to the buyer in good condition and/or the services have been performed, and have been accepted by the buyer;

(m) that we have full and perfect title to and right to convey this contract free of any encumbrances, lien or interest of third parties of any nature whatsoever;

(n) the buyers under the contract have no rights to rescind the contract or if such rights existed that due and proper notice of the existence of such rights was given and such rights were not exercised;

(o) all construction work has been paid for and there are no mechanics liens filed or to be filed on the property; and

(p) there have been no material changes in the buyer's income, indebtedness or employment and no other material changes between loan approval and funding. This is a condition to assignee funding the contract.

If any of these warranties is breached or untrue, seller will, upon assignee's demand, purchase this contract from assignee. The purchase shall be in cash in the amount of the unpaid balance (including interest) plus the cost and expenses of assignee, including attorney's fees.

Seller will indemnify assignee for any loss sustained by it because of partial non-payment or as the result of a recovery made against assignee as a result of a claim or defense buyer has against seller.

Seller waives notice of the acceptance of this assignment, notice of non-payment or non-performance and notice of any other remedies available to assignee.

Assignee may, without notice to seller, and without affecting the liability of seller under this assignment, compromise or arbitrate any rights against, and grant extensions of time for payment to be made, to buyer and any other person obligated under this contract.

1. **WITHOUT RECOURSE** This assignment shall be without recourse, except as stated above.

2. **WITH RECOURSE** In addition to those events stated above, seller agrees that if buyer defaults in full payment, when due, of any amounts payable under this contract, or in the prompt performance of any obligation to be performed by buyer under this assignment, seller will, upon demand, repurchase this contract from assignee in cash in the amount of the unpaid balance (including interest) due at that time.

3. **SEPARATE AGREEMENT** - This assignment is subject to a separate agreement with the assignee.

Hi-RIC GT-15-41-010 (11/92)

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT

No. 1564498

Date May 12, 1994

Buyer: Daniel B Lackey
33 Berry
Barnwell , SC 29812
"You" and "your" means each Buyer above and guarantor, jointly and severally.

Seller: ALLSTATE HOME SERVICE, INC.
113 AIRPORT PARK DR
SAVANNAH , GA 31408
"We" and "us" means the Seller above, its successors and assigns.

SALE: You agree to purchase the property (and/or services) described below according to the following terms, including those on the reverse side.

You agree to pay us the principal sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 dollars ($ 7500.68) plus interest from the disbursement date at the rate of 15.99 % per year until paid in full. You will pay the total amount due in 048 installments of $ 204.91 each, beginning SEE BELOW, 19 ____ and continuing on the same day of each Month thereafter until paid in full.

If your first payment date is more than thirty days from the date of completion, you agree that any accrued interest (which will not be paid with your first payment) will be added to your principal balance as a deferred charge and that interest shall be calculated upon such deferred charge at the contract rate over the loan terms. N/A

PREPAYMENT: You may prepay this contract in full at any time.

LATE CHARGE: You agree to pay a late charge when an installment is not paid within ____ days after it is due. This charge will be ____ % of the unpaid portion of the installment or $ N/A, whichever is less. However, this charge will not be less than $ ____. You also agree that we may charge those amounts pursuant to §37-2-203 and 37-1-108 of the South Carolina Consumer Protection Code so as to always be the maximum amounts allowed by law.

DESCRIPTION OF GOODS AND/OR SERVICES AND SECURITY AGREEMENT - Here is a description of the goods and/or services you are purchasing. To secure the payment of this contract, you give us a security interest in the goods plus all accessions, attachments, accessories and replacement, plus all proceeds arising from all of these. You also agree to give us a separate mortgage (or deed of trust) on the real property described below.

JOB NUMBER:

INSTALLATION OF:	DESCRIPTION OF GOODS/SERVICES
Windows	
Rev doors	

REAL PROPERTY ADDRESS: 33 Berry Barnwell SC 29812

WARRANTIES: WARRANTY INFORMATION IS SUPPLIED TO YOU SEPARATELY.

LOCATION: The goods and services installed will be located at the real property address listed above.

You will furnish to us at our request, a disclaimer signed by all persons having an interest in the above described real estate of any right, title or interest in or lien upon this property prior to the security interest created by this contract.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you or on your behalf.	TOTAL OF PAYMENTS The amount you will have paid when you have made all scheduled payments.	TOTAL SALE PRICE The total cost of your purchase on credit, including your down payment of $ 9835.68 .00
13.99 %	$ 2335.68	$ 7500.00	$ 9835.68	

Your Payment Schedule will be:	Number of Payments	Amount of Payments	When Payments Are Due
	048	$ 204.91	Monthly Beginning Approximately 30 Days From Disbursement Date (e)

Security: You are giving a security interest in: ___ Brief description of other property ____

X the goods or property being purchased.

X the real property where the improvements are made.

Late Charge: You will be charged a late charge when an installment is not paid within ____ days after it is due. This charge will be N/A % of the unpaid portion of the installment, or $ N/A, whichever is less. However, this charge will not be less than $ ____.

These amounts may change pursuant to §37-2-203 and 37-1-108 of the South Carolina Consumer Protection Code. .00

Prepayment: If you pay off this contract early, you ___ may ___ X will not have to pay a penalty. Filing fees $ ____

You can see your contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties. "e" means an estimate.

CREDIT INSURANCE

CREDIT LIFE INSURANCE AND CREDIT DISABILITY INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT, AND WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL COSTS.

Type	Premium	Term
Credit Life	.00	0
Credit Disability	.00	0
Joint Credit Life	.00	000

You ___ do ___ do not want credit life insurance.
X N/A

You ___ do ___ do not want credit disability insurance.
X N/A

You ___ do ___ do not want joint credit life insurance.
X N/A
XX N/A

PROPERTY INSURANCE

You may obtain property insurance from anyone that is acceptable to us. If you get the insurance from or through us you will pay $ .00 for 00 YEARS of coverage.

The property insurance premium is calculated as follows:

___ Fire-Theft and Combined Add'l. Coverage	$ .00
	$ .00
	$ .00
	$ .00

The above insurance does not include liability insurance coverage for bodily injury and property damage unless such insurance is specifically described above.

ASSIGNMENT

Seller assigns this contract on May 12, 19 94 to CREDIT TREE FINANCIAL CORP. in accordance with the Seller's Assignment appearing on the reverse side. The assignment is 1. ___ Without Recourse 2. ___ With Recourse 3. XX subject to a Separate Agreement.

X ALLSTATE HOME SERVICE, INC. (Seller)
By [signature] Title Finance

ITEMIZATION OF AMOUNT FINANCED 7500.00

1.	Cash Price (including Sales Tax)	$ .00
2.	Cash Down Payment	$ 7500.00
3.	Unpaid Balance of Cash Price (1 minus 2)	$
4.	Other Charges:	.00
(a)	To Insurance Companies	$ .00
(b)	To Public Officials	$ .00
(c)	To Inspector	$ .00
(d)	To Appraiser	$ .00
(e)	Property Report	$
(f)	Processing Fee	$ .00
(g)	to Green 1268	$
(h)	Discount Points	$ .00
(i)	to Green 1268	$
(j)		$
(k)		$
(l)		$
5.	Subtotal (3 plus 4(a) through 4(l))	$ 7500.00
6.	Prepaid Finance Charges:	.00
(a)	Prepaid Fees	$
(b)		$
(c)		$ 7500.00
7.	Amount Financed (5 minus 6(a) through 6(c))	$

NOTICE TO BUYER: (1) Do not sign this contract before you read it or if it contains any blank spaces. (2) You are entitled to an exact copy of the contract you sign. (3) Under the law you have the right, among others, to pay in advance the full amount due, and to obtain under certain conditions a partial refund of the finance charge. (4) This contract shall become effective only when signed and executed by the buyer and seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of both parties to this contract.

BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS RETAIL INSTALLMENT CONTRACT

1. Signed X Daniel B Lackey Buyer
Daniel B Lackey

2. Signed X ____ Buyer

YOU ALSO AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS CONTRACT

Signed X [signature] For Seller
Title

White First Copy-Lender Green Second Copy-Regional Office Canary Third Copy-Buyer Pink Fourth Copy-Seller Goldenrod Fifth Copy-Extra

GT-15-41-010 (11/92)

35

ADDITIONAL TERMS OF THE CONTRACT AND SECURITY AGREEMENT

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

GENERAL TERMS - As used in this document, "control" includes the meaning of this security agreement. This term means [illegible] or equipment or [illegible] or any owner or [illegible] or any owner or any owner or any owner

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

COURT OF COMMON PLEAS
C.A. No. 96-CP-06-073

DANIEL B. LACKEY, *et al.*,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION,
Defendant.

ARBITRATION HEARING

* * * *

DAY ONE: Monday, March 6, 2000
10:18 a.m.-3:04 p.m.
DAY TWO: Tuesday, March 7, 2000
DAY THREE: Wednesday, March 8, 2000

* * * *

[page 72] MR. SIMPSON: We call Mr. Edwin Lesley, Your Honor.

EDWIN LESLEY, being duly sworn, testifies as follows:

MR. LESLEY-EXAMINATION BY MR. SIMPSON:

Q: Mr. Lesley, could you please tell us a little bit about yourself? Could you please tell us a little bit about your work history and your experience in the banking industry?

[page 73] A: Yes. I entered the banking industry following college in 1970. I was with First National Bank of South Carolina. I spent from 1970 until 1983 with First National

Bank. In 1983, I went to South Carolina Federal and stayed there until merger by First Union in 1993 and left there in mid 1995.

* * * *

[page 98] Q: Mr. Lesley, you talked about second mortgage lending with Security Federal or South Carolina [page 99] Federal. Your understanding of the preference notice and when it was required, what is that understanding?

A: That if a consumer loan was made secured by real estate, then the consumer was entitled to receive preference.

Q: Did it depend on the charging of attorney's fees at all?

A: No, it did not.

Q: When was that your understanding, what year?

A: In the time frame of '83 for sure, but . . .

Q: Okay.

A. . . . at exactly what point in time that I became actively involved in it, I can't tell you.

Q: So that was your understanding prior to the administrative interpretation issued in '93?

A: Absolutely.

* * * *

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

COURT OF COMMON PLEAS

CASE NO. 98-CP-06-073

DANIEL B. LACKEY, GEORGE BUGGS, FLORINE BUGGS, MICHAEL HIGHSMITH, AND PAULA JOHNSON, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION,
Defendant.

DEPOSITION OF: HARRY J. HAYNSWORTH, IV

DATE: March 8, 2000

* * * *

[page 3] Q. I want to go through some preliminary matters with you, Mr. Haynsworth, and then I want to go through some more specific matters; but would you please advise me when you were asked by Green Tree to come appear in this arbitration?

[page 4] A. Probably about a month ago.

Q. Okay. And who contacted you?

A. Mr. Robert Byrd.

Q. And what did Mr. Byrd ask you to do?

A. He asked me if I would be willing to be a witness in the—in the arbitration hearing. Basically, what was involved were questions relating to attorney's fees and insurance agent

preferences. And there was one of a number of different statutes that had been filed over those provisions in the South Carolina Consumer Credit Code.

* * * *

[page 8] Q. Now, what do you expect that your testimony is going to do to assist Green Tree in this matter?

A. I'm not really sure what I'm going to talk about—or what I thought I was going to talk about, if I'm allowed to talk about it, is the way all these various statutes were pieced together and what the understanding was when that was—when that [page 9] was done.

Q. What whose understanding was?

A. Well, it would have to be my understanding since I'm the one that drafted the statutes. And, in fact, the process that was followed in this particular—when the statute was revised in 1982, which is the Act 385, which is basically the rewrite of the Consumer Protection Code, that that was done with a group of both creditors and lenders and representatives of consumer—Department of Consumer Affairs and all the statutes were drafted by consensus.

The process followed was that certain proposals were made and then everybody reviewed them and then, after everybody had agreed, either something should be in or out, then it was my job to basically draft that consensus.

* * * *

[page 76] Q. So even under your reading of the law, all of this period of time, Green Tree should have been giving the insurance preference notice; correct?

MR. BYRD: Objection to the form.

THE WITNESS: Assuming that they were [page 77] charging the borrower for hazard or—or requiring the borrower to have hazard, whatever insurance, they should have been giving the attorney preference notice, yes.

BY MR. HAMM:

Q. And even under your testimony regarding intent, that was clear prior to Tilley; correct?

A. Yes.

Q. That was clear prior to the 1993 administrative interpretation; correct?

A. Yes.

* * * *

No. 02-634

FEB 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated, DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF PETITIONER

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
VIRGINIA M. VANDER JAGT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

February 24, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are listed in the caption of the decision of the Supreme Court of South Carolina. Pet App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioner is a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock is publicly traded. No publicly owned company owns ten percent or more of the stock of Conseco, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT VIOLATED THE FEDERAL ARBITRATION ACT'S CORE REQUIREMENT THAT ARBITRATION AGREEMENTS BE "RIGOROUSLY" ENFORCED ACCORDING TO THEIR WRITTEN TERMS	18
A. Section 2 Of The FAA Requires That Written Arbitration Agreements Be Enforced According To Their Terms	19
B. Sections 3 And 4 Of The FAA Do Not Permit State Courts To Rewrite Or Modify The Terms Of Parties' Private Arbitration Agreements	25
II. THE IMPOSITION OF CLASS ARBITRATION ONTO THE AGREEMENTS AT ISSUE, WHICH DO NOT PROVIDE FOR CLASS ARBITRATION, VIOLATED THE FAA	30

TABLE OF CONTENTS—continued

Page

A. The South Carolina Supreme Court's Decision Violated The FAA By Allowing Courts To Impose Their Views Of Equity And Efficiency Onto The Parties' Arbitration Agreements 31

B. The Trial Court's Imposition Of Class Arbitration Onto The Parties' Agreements In Violation Of The FAA Infected The Arbitrations 34

C. In All Events, Class Arbitration Cannot Be Reconciled With The Terms Of The Arbitration Agreements In This Case 38

1. The Terms Of The Arbitration Agreements Preclude Class-Wide Arbitration 38

2. *Waffle House* Confirms That Class Arbitration Cannot Be Imposed Onto The Parties' Agreements 44

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

Page

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) ..... *passim*

AT&T Techs., Inc. v. *Communications Workers of Am.*, 475 U.S. 643 (1986) 38

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 41, 42

Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 29

Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 5, 20, 28, 33, 40

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) ..... *passim*

Dickler v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991) 40

Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) ..... *passim*

EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) ..... *passim*

Eljer Mfg., Inc. v. *Kowin Dev. Corp.*, 14 F.3d 1250 (7th Cir. 1994) 43

First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) ..... *passim*

General Tel. Co. of Southwest v. *Falcon*, 457 U.S. 147 (1982) 41

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ..... *passim*

Government of U.K. v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) 29

Hansberry v. *Lee*, 311 U.S. 32 (1940) 41

Howsam v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002) 22

Keating v. *Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) 40

TABLE OF AUTHORITIES—continued

	Page
Lackey v. *Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998)	12
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985)	19
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)	5, 22, 23, 39, 44
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)	5, 20, 24, 25
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983)	6, 19, 24, 27, 32
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	41
Munoz v. *Green Tree Fin. Corp.*, 542 S.E.2d 360 (S.C. 2001)	30
NCR Corp. v. *Sac-Co., Inc.*, 43 F.3d 1076 (6th Cir. 1995)	43
New Hampshire v. *Maine*, 532 U.S. 742 (2001)	37
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999)	40
Pacific Reinsurance Mgmt. Corp. v. *Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991)	43
Perry v. *Thomas*, 482 U.S. 483 (1987)	20, 25, 27, 28
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985)	40, 41
Scherk v. *Alberto Culver Co.*, 417 U.S. 506 (1974)	19, 23
Southland Corp. v. *Keating*, 465 U.S. 1 (1984)	*passim*
United States v. *Utah*, 199 U.S. 414 (1905)	39
Volt Info. Scis., Inc. v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)	*passim*

STATUTES

9 U.S.C. §§ 1-16	2
§ 2	*passim*

TABLE OF AUTHORITIES - continued

	Page
9 U.S.C. § 3	26, 30
§ 4	26, 30
§ 10	30, 38
S.C. Code Ann. § 15-48-20(a)	27
§ 37-10-102(a)	9
§ 37-10-105	9

RULES

Fed. R. Civ. P. 23	32, 41, 42
Fed. R. Civ. P. 42	32

LEGISLATIVE HISTORY

H.R. Rep. No. 68-96 (1924)	25

OTHER AUTHORITIES

12 Am. Jur. *Contracts*	42
Restatement (Second) of Contract Law (1981)	42
5 James Wm. Moore et al., *Moore's Federal Practice* (MB) (3d ed. June 2002)	40
18 James Wm. Moore et al., *Moore's Federal Practice* (MB) (3d ed. June 2002)	37

IN THE

Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated, DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is published at 569 S.E.2d 349 (S.C. 2002) and appears in the Appendix of the Petition for Certiorari ("Pet. App.") at 1a-26a. The South Carolina Court of Common Pleas' Order confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and appears at Pet. App. 27a-35a. The South Carolina Court of Common Pleas' Order confirming the final award in arbitration and denying Green Tree's motion to vacate in *Lackey* v. *Green Tree Financial Corp.* is

unpublished and appears at Pet. App. 36a-54a. The final order and arbitral award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and arbitral award in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. The petition for a writ of certiorari was filed on October 23, 2002, and was granted on January 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are contained in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, which mandates enforcement of written agreements to settle by arbitration controversies arising out of contracts evidencing transactions involving commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such "written" arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* The relevant provisions of these statutes are reproduced in the statutory addendum to this brief.

STATEMENT OF THE CASE

The question presented in this case is whether a simple two-party arbitration proceeding can be converted, over one of the parties' objections, into a class-action arbitration, where the parties expressly have agreed that the proceeding will be governed by the FAA and have included no provision to allow for class-wide arbitration. As explained below, the clear answer is no.

In its decision below, the Supreme Court of South Carolina rejected Green Tree's challenge under the FAA to two interrelated class-action arbitration awards, which require Green Tree to pay nearly $27 million in statutory damages, attorney's fees and costs to two classes consisting of a total of more than 3,700 individuals. Green Tree challenged those arbitral awards because the written arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action mechanisms to be superimposed onto private arbitration agreements absent the parties' consent.

There is no dispute that the arbitration agreement underlying the South Carolina Supreme Court's judgment does not provide for class-wide arbitration. Rather, the arbitration agreement provides for resolution of "[a]ll disputes, claims or controversies" arising from "this contract" "by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a. The arbitration agreement thus authorizes an arbitrator, chosen by the parties to the contract, to resolve bilateral disputes between those two contractually defined parties: (1) "you," *i.e.*, the buyer obtaining the loan, and (2) "us," *i.e.*, the seller or its assign Green Tree. *Id.* Respondents, for their part, agree that, at a minimum, the "arbitration agreement" does not "speak[] to the question of class arbitration[]." Brief in Opposition ("Opp.") 12; *id.* at 5 (same). Notwithstanding this contractual language, the South Carolina Supreme Court ruled that class arbitration could be imposed judicially onto the parties' agreement without regard to their contractual intent "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. That reformation of the contract to promote policy preferences of a court cannot be reconciled with the requirements of the FAA.

As this Court has explained on repeated occasions, the FAA was designed "to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" *Doctor's Assocs.*,

Inc. v. *Casarotto*, 517 U.S. 681, 688 (1996) (alteration in original) (quoting *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). That mandate requires both state and federal courts to enforce written arbitration agreements and thus prevents them from rewriting such private agreements to suit the courts' policy views of efficiency or equity. Indeed, the FAA "requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Where, as here, a private arbitration agreement does not provide for class-wide arbitration, the FAA prohibits class-action arbitration from being imposed onto the parties' agreement, as was done here, based upon a court's own views of "efficiency" or "equity." See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("we do not . . . reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated"). The notion that courts are free to intrude upon the contractual aspects of an arbitration agreement by imposing their own views of public policy onto a private arbitration agreement simply cannot be squared with the FAA. Accordingly, the decision below must be reversed.

Statutory Background

Section 2 of the FAA provides that written arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting Section 2 of the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, *e.g.*, *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter*, 470 U.S. at 219-20. Specifically, the FAA permits private parties to trade the judicial procedures that otherwise would apply to resolve their disputes in court for the

informality, simplicity and speed of the arbitral process. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded almost 20 years ago, and more recently has reaffirmed, that Section 2 of the FAA, which the Court has ruled to be the "substantive" provision of the FAA, applies both in state and federal courts. *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*); cf. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121-22 (2001).

Essential to Congress's goal of ensuring the enforcement of parties' written agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479); see also *Doctor's Assocs.*, 517 U.S. at 688 (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate").

Because "'[a]rbitration under the [FAA] is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479), courts must "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement," *id.* In the same way that an arbitration agreement "cannot bind a nonparty," *id.*, the FAA

"does not expand the range of claims subject to arbitration beyond what is provided for in the agreement," *id.* at 293 n.9. As a result, courts must "respect the terms of the [arbitration] agreement without regard to the federal policy favoring arbitration." *Id.* at 294 n.9.

As this Court has noted, arbitration "'is usually cheaper and faster than litigation.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Dean Witter*, 470 U.S. at 220; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). But the "basic objective" under the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *Id.* at 947 (citations and internal quotation marks omitted). Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement. . . . notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement ("Bazzles' Contract") to finance home improvements including the installation of windows. A copy of that contract is reproduced in the Joint Appendix ("J.A.") at 33-34. At the top of the first page, the Bazzles' Contract identifies Lynn and Burt Bazzle as the only two "Buyer[s]" and defines the terms "'You' and 'your'" to mean "each Buyer *above* and guarantor, jointly and severally." *Id.* at 33 (emphasis added). Similarly, just below the printed Seller's name, the Bazzles' Contract defines "'We' and 'us'" to mean "the Seller above, its successors and assigns." *Id.* On the bottom of the same

page, the Bazzles' Contract provides that the Seller has assigned its rights to Green Tree Financial Corp. *Id.*

The Bazzles' Contract further explains that the Bazzles would use the $15,136 extension of credit to finance the "installation of . . . windows" and, in turn, that the Bazzles were providing a security interest in those goods and the real property where the improvements were to be made. J.A. 33 (capitalization omitted). The agreement specified that "You," *i.e.*, the Bazzles, "may obtain property insurance from anyone that is acceptable to us." *Id.* Above the signature block, the Bazzles' Contract cautions: "Do not sign this contract before you read it . . . ," *id.*, and "This contract shall become effective only when signed and executed by the buyer and seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of both parties to this contract." *Id.* Directly above their signatures, the Bazzles' Contract states in large typeface: "BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS RETAIL INSTALLMENT CONTRACT." *Id.* Similarly, just below their signatures, the Bazzles' Contract provides: "YOU ALSO AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS CONTRACT." *Id.*

On the reverse side, the Bazzles' Contract includes an arbitration clause. The arbitration clause states, in pertinent part:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they

choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Pet. App. 110a. A copy of the arbitration clause is reproduced in full at Pet. App. 110a-111a.

The agreement imposes several constraints on the arbitration that it authorizes. First, the written agreement identifies the matters that will be subject to arbitration: "All disputes, claims, or controversies arising from or relating to *this contract* or the relationships which result from *this contract*, or the validity of this arbitration clause or the entire contract." Pet. App. 110a (emphasis added). Second, the arbitration agreement identifies the parties who have agreed to arbitrate ("you" and "us"), and the manner in which those parties would choose an arbitrator to resolve disputes arising out of "this contract" (*i.e.*, "one arbitrator selected by us with consent of you"). *Id.* Further, the arbitration agreement specifies that it "shall be governed by the Federal Arbitration Act." *Id.* Although the arbitrator is given "all powers

provided by the law and the contract," those powers necessarily are limited to resolving and providing relief with respect to "disputes, claims, or controversies arising from or relating to *this* contract or the relationships which result from *this* contract." *Id.* (emphasis added). By limiting the arbitrator's authority to resolving disputes, claims, or controversies "arising from or relating to" the Bazzles' Contract, the agreement withholds authority to resolve disputes arising from or relating to *other* contracts involving *other* individuals who are not parties to the Bazzles' Contract.

Notwithstanding their express agreement to arbitrate, on March 25, 1997, the Bazzles filed an individual action against Green Tree in South Carolina state court alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. See S.C. Code Ann. §§ 37-10-102(a), -105. The Bazzles alleged that Defendants did not "advise Plaintiffs of their right to select counsel and/or an insurance agent." Rec. on Appeal at 1369. Plaintiffs sought "actual and punitive damages, statutory damages and penalties, treble damages, attorneys' fees, costs and expenses, and whatever further relief the Court deems just and proper." *Id.* at 1374.

About a month later, on April 21, 1997, the Bazzles decided to expand their case by filing an amended class-action complaint and, at the same time, they filed a motion for class certification. Green Tree moved to stay the court proceedings (including the motion for class certification) and requested an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. Rec. on Appeal at 1448. On December 5, 1997, the trial court granted the Bazzles' motion for class certification (thereby denying

Green Tree's motion for a stay of all proceedings) and entered an order compelling arbitration. Pet. App. 3a.[1]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings that the trial court had ordered were administered solely by the arbitrator. On July 24, 2000, the arbitrator issued an award against Green Tree on behalf of a class of 1,899 individuals. The merits of the arbitration concerned whether the Bazzles were provided with notice of their right to choose their own attorney or insurance agent in connection with the Bazzles' Contract. Green Tree did not require the Bazzles to use an attorney or insurance agent in connection with the transaction. Although Plaintiffs were authorized to recover "actual damages" if they could show that they had been injured, the arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages." Pet. App. 69a. He nevertheless imposed a class-wide "penalty" upon Green Tree of between $5,000 and $7,500 "per transaction," which resulted in a total award of $10,935,000 in statutory damages. *Id.* at 71a.

The arbitrator also awarded Plaintiffs an additional $3,645,000 in attorney's fees based upon not only their prosecution of the arbitration, but also, among other things, their lobbying efforts during the 1997 South Carolina legislative session. Pet. App. 77a, 79a. The arbitrator rejected Green Tree's showing that "[i]f every hour submitted by the Plaintiffs is allowed, a $3,000,000 attorneys fee award would result in an hourly rate exceeding $900.00 per hour." Rec. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed

[1] On March 17, 1998, the trial court denied Green Tree's motion to reconsider the order granting class certification. Green Tree filed an appeal challenging the trial court's order certifying a class for arbitration, but the appeal was dismissed by the court of appeals as interlocutory. Pet. App. 28a.

would not be returned to Green Tree, but instead would be tendered to charitable groups chosen by plaintiffs' counsel: "75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach." Pet. App. 79a.

The Bazzles filed a motion to confirm the award in the state trial court, and Green Tree sought to vacate the award. Green Tree showed that the class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. The Bazzles, for their part, argued that "this Court determined in this matter that the matter could proceed as a class action" and that the "Arbitrator received the case as a class action." J.A. 31. Thus, the Bazzles expressly argued that "Green Tree incorrectly implies that the arbitrator determined the matter could proceed as a class action." *Id.* (capitalization omitted). Indeed, they made clear that, "to the extent that Judge Ervin [the arbitrator] made such a decision, if any, in this case or the *Lackey* case, it was a reaffirmation and/or adoption of this Court's prior determination." *Id.* at 32 n.2. The trial court confirmed the arbitral award and denied Green Tree's motion to vacate, and, in doing so, explained that the court had ordered class arbitration, had "previously ruled on Green Tree's motion for reconsideration of class certification," and saw "no basis to address the issue again." Pet. App. 34a.

The Lackey Proceedings. Daniel Lackey (and George and Florine Buggs) also entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. J.A. 35-36 (Lackey Contract). These agreements contained an arbitration clause that is in all relevant respects identical to the arbitration agreement in the *Bazzle* proceeding. Pet. App. 19a n.18. Indeed, according to the South Carolina Supreme Court, the arbitration agreements in the Bazzles' Contract and the Lackey Contract "are identical except for one word. The

Bazzle clause says the arbitrator will be selected by Green Tree 'with the consent of *you*,' and the *Lackey* clause says 'with the consent of *Buyer[s]*.'" *Id.*

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and the Buggses commenced a class action lawsuit against Green Tree in state court, also alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. Green Tree filed a motion to compel arbitration, but the trial court ruled that Green Tree's arbitration agreement was unenforceable. Pet. App. 5a-6a. Green Tree appealed, and the court of appeals reversed, holding that the arbitration agreement should be enforced. See *Lackey* v. *Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). Thereafter, Thomas Ervin, the same arbitrator who was presiding over the *Bazzle* proceeding, was appointed as arbitrator in the *Lackey* proceeding.

The *Lackey* plaintiffs expressly argued, based upon the decision of the trial court in the *Bazzle* proceeding, that the arbitration should proceed as a class action. Specifically, the *Lackey* plaintiffs contended that class-action arbitration should proceed because

> [i]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of a class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration.

Rec. on Appeal at 516. Green Tree explained that the arbitrator had no authority to order class arbitration. J.A. 15-16. The *Lackey* parties' arguments were accepted, and, as a result, the arbitrator followed the approach that had been imposed upon him by the trial court in *Bazzle*, certified a

class-wide arbitration, and approved a class notice that was sent to class members. *Id.* at 17-23.

On the merits, the arbitrator concluded that Green Tree had violated the attorney and insurance-agent notice preference requirements of South Carolina law. Pet. App. 91a. As in *Bazzle*, the arbitrator acknowledged that "plaintiffs as a class did not attempt to show actual damages," *id.* at 96a, but he nevertheless imposed a "penalty" of "$5,000 per transaction," for a total of $9,200,000 in statutory damages to the 1,840 class members, *id.* at 98a. The arbitrator also required Green Tree to pay $3,066,666 in attorney's fees (and $18,252 in costs), and, as in *Bazzle*, relied upon plaintiffs' counsel's lobbying efforts to justify a fee award that would compensate plaintiffs' counsel at a rate in excess of $900.00 per hour. *Id.* at 106a-107a. Finally, as in *Bazzle*, the arbitrator concluded that any unclaimed funds would not be returned to Green Tree, but instead would be distributed to charitable organizations chosen by plaintiffs' counsel. *Id.* at 107a.

Green Tree moved in state trial court to vacate the arbitral award, explaining that the award should be set aside because "the power of an arbitrator . . . is limited by the parties' arbitration agreement" and the arbitrator lacked authority to impose class arbitration on the parties. Rec. on Appeal at 408 (citing, *inter alia*, *Mastrobuono*, 514 U.S. at 57). The trial court, however, denied Green Tree's motion and confirmed the arbitral award, ruling, among other things, that Green Tree "was afforded exactly the proceeding in binding arbitration that it sought." Pet. App. 45a. Green Tree appealed.

Decision of the Supreme Court of South Carolina

The Supreme Court of South Carolina assumed jurisdiction over the *Bazzle* and *Lackey* appeals and consolidated the proceedings. Pet. App. 2a. The court below first ruled that both arbitration agreements were "governed by the FAA." *Id.* at 11a & n.9. The South Carolina Supreme Court recognized, however, that "[s]everal federal circuits have precluded class-

wide arbitration when the arbitration agreement is silent," whereas "the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent." *Id.* at 11a, 12a. The court further explained that "[t]he United States Supreme Court has not addressed the FAA's impact on class-wide arbitration" and therefore "there is no binding precedent that [the South Carolina Supreme Court] is obligated [to] follow." *Id.* at 11a.

Although the arbitration agreements in these cases, by their terms, limit arbitration to "'disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*,'" the court below concluded, without any elaboration, that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a. The court ruled, without any explanation, that this language "creates an ambiguity" that the court would construe against Green Tree to conclude that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.*

Given its determination that the agreement was "silent" as to the availability of class-action arbitration, the court below explained that it previously had "held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." Pet. App. 21a (relying upon *Episcopal Hous. Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979)); see *id.* at 18a-19a. The court reasoned that because it "permits consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—"it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." *Id.* at 21a (internal quotation marks omitted).

Based upon this reasoning, the court below "adopt[ed] the approach taken by the California courts" and held "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and

would not result in prejudice." Pet. App. 22a. Although the Bazzles initially had filed suit individually and although the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees and costs, the court suggested that, absent class-wide arbitration, "parties with nominal individual claims . . . would be left with no avenue for relief." *Id.* The court further reasoned that class arbitration was appropriate because "hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." *Id.* Because the court concluded that the imposition of class-action procedures onto a "silent" arbitration agreement was a permissible, albeit discretionary, option, it upheld the arbitral awards in both *Bazzle* and *Lackey*. *Id.* at 23a.

SUMMARY OF ARGUMENT

The decision and judgment of the South Carolina Supreme Court should be reversed because it violates the FAA's core principle that arbitration agreements must be enforced as written and may not be rewritten by courts to further their own notions of public policy. See 9 U.S.C. § 2. The court below violated the FAA by ruling that class-wide arbitration could be imposed without regard to the written terms of the parties' arbitration agreements.

This Court's decisions make clear that the FAA was designed to overcome judicial hostility to arbitration by mandating that arbitration agreements be enforced rigorously in accordance with their terms. See, *e.g.*, *Volt*, 489 U.S. at 478. Arbitration must be based upon "'consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479). Moreover, the requirement that courts enforce written arbitration agreements is reflected in Section 2 of the FAA, which applies both in state and federal court. *Southland*, 465 U.S. at 10 (holding that Section 2 of FAA applies in state court); *Allied-Bruce*, 513 U.S. at 272 ("we

find it inappropriate to reconsider what is by now well-established law").

This core requirement reflected in Section 2 does not depend, as Respondents suggest, Opp. 14, on whether Sections 3 and 4 of the FAA also apply by force of law to state court proceedings. Indeed, at the same time that this Court has declined to resolve whether Sections 3 and 4 of the FAA apply in state courts, it consistently has made clear that the FAA requires rigorous enforcement of the written terms of arbitration agreements in all cases whether arising in state or federal court. In all events, even if Sections 3 and 4 of the FAA did not apply to state court proceedings by force of law, they would apply in this case by contract because the parties agreed expressly that their arbitration agreement "shall be governed by the [FAA]." Pet. App. 110a; see *Volt*, 489 U.S. at 478-79 (explaining that parties can choose the procedures governing their arbitration). Accordingly, there can be no question that the courts below were not authorized to modify or rewrite the parties' arbitration agreements to conform to their own notions of efficient dispute resolution. Instead, those courts were obligated to enforce those agreements in accordance with their written terms. See 9 U.S.C. § 2.

The decision below cannot be reconciled with the requirements of the FAA. The approach adopted by the court below permits courts to impose their own views regarding arbitration without regard to the parties' expressed intent. The South Carolina Supreme Court ruled that class arbitration could be imposed upon the parties without any contractual directive to do so if, in the *court*'s view, class arbitration would "serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. Under the FAA, courts have no authority or discretion to supplement the parties' arbitration agreement without the "consent" of the parties as expressed in their private agreement. Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. As a result, efforts to rewrite

or modify arbitration agreements are nothing more than another variation of the old judicial hostility to arbitration that the FAA was designed to eliminate. See, *e.g.*, *id.* at 478; *Waffle House*, 534 U.S. at 293.

Here, the imposition of class arbitration onto the parties' agreement violated the FAA and infected the arbitration proceedings. The court below substituted its own coercion for the parties' consent, by fundamentally rewriting and transforming the arbitration agreements to which the parties had agreed. Instead of an informal, bilateral arbitration limited to resolving disputes between the two contractually defined parties, "you" and "us," and a contractually defined method for choosing the arbitrator for each such dispute, the class arbitrations imposed here required Green Tree to defend against the claims of thousands of *other* individuals who were not parties to the Bazzle and Lackey Contracts and who never even requested arbitration. Cf. *Waffle House*, 534 U.S. at 294 ("It goes without saying that a contract cannot bind a nonparty."). Similarly, imposition of class arbitration expanded the scope of the arbitration to include not only claims arising from or relating to "this Contract," but also disputes arising from or relating to thousands of *other* contracts.

Finally, the practical problems associated with class arbitration warrant careful scrutiny of any private dispute-resolution agreement before class arbitration is imposed onto it. A class arbitration implicates the due-process rights of non-representative members and therefore should not be lightly inferred absent an express indication that the parties to the arbitration agreement (and all class members) were aware that their disputes could be resolved through class arbitration. Here, the parties' intent is expressly to the contrary, because the imposition of class arbitration expanded the parties' agreement beyond recognition by sweeping thousands of additional parties into the *Bazzle* and *Lackey* arbitrations even

though they were not parties to the specific contracts that authorized the arbitrations in the first instance.

In short, the decision below, which authorizes that revision of the parties' agreement to arbitrate, should be reversed because it violates the FAA's core requirement "'that private agreements to arbitrate [must be] enforced according to their terms.'" *Doctor's Assocs.*, 517 U.S. at 688 (quoting *Volt*, 489 U.S. at 479).

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT VIOLATED THE FEDERAL ARBITRATION ACT'S CORE REQUIREMENT THAT ARBITRATION AGREEMENTS BE "RIGOROUSLY" ENFORCED ACCORDING TO THEIR WRITTEN TERMS.

The South Carolina Supreme Court, in this case, held that under the Federal Arbitration Act ("FAA") class-arbitration could be imposed "without any contractual . . . directive to do so." Pet. App. 21a. The Court's rationale was that this result promoted the court's view of "efficiency and equity" and "judicial economy." *Id.* at 22a. This holding is in direct conflict with the FAA's primary mandate that courts must enforce the written terms of arbitration agreements and may not rewrite or modify those agreements to suit the court's views of public policy. That mandate, which is rooted in Section 2 of the FAA, 9 U.S.C. § 2, applies in both state and federal courts and unquestionably applies here to arbitration agreements whose terms expressly provide that the arbitration clause "shall be governed by the Federal Arbitration Act." Pet. App. 110a. Measured against these standards, the decision below must be reversed because the South Carolina Supreme Court concluded that the FAA does not, in fact, prohibit courts from rewriting or modifying arbitration agreements instead of enforcing their written terms.

A. Section 2 Of The FAA Requires That Written Arbitration Agreements Be Enforced According To Their Terms.

1. "'[T]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Here, Section 2 of the FAA provides, in relevant part, that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Through Section 2, Congress mandated that written arbitration agreements must be "enforce[d]," just like any other contract would be.

Section 2 "is the primary substantive provision of the Act." *Moses H. Cone*, 460 U.S. at 24; see also *Gilmer*, 500 U.S. at 24-25. It "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. Moreover, "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

Congress, by "mandat[ing] the enforcement of arbitration agreements," *id.*, implemented a national policy to address long-standing judicial hostility to such agreements and to permit private parties to choose how they would resolve their disputes. See, *e.g.*, *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 510-11 & n.4 (1974). Congress recognized the "desirability of arbitration as an alternative to the complications of litigation," *id.* at 511 (internal quotation

marks omitted), and thus, through Section 2, permitted private parties to "'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

Because the long-standing judicial hostility to arbitration agreements had existed in both state and federal courts, and because the text of Section 2 does not limit the section's scope to federal courts, this Court concluded almost 20 years ago, in *Southland*, that Section 2 applies in both state and federal courts. *Southland*, 465 U.S. at 12-15; *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). The Court recently has reaffirmed that Section 2 of the FAA applies in state courts. *Allied-Bruce*, 513 U.S. at 272; see *Circuit City Stores*, 532 U.S. at 121-22. Respondents do not challenge *Southland*, and instead agree, as they must, that Section 2 of the FAA preempts conflicting state law. Opp. 14 (citing *Volt*, 489 U.S. at 477). Indeed, this Court has held in numerous cases that Section 2 of the FAA preempts contrary state law in state-court cases.[2]

2. Section 2 of the FAA prohibits state and federal courts from rewriting private arbitration agreements to suit their own subjective notions of efficiency or judicial economy. This Court has made clear that Section 2 of the FAA requires courts to "rigorously enforce agreements to arbitrate," *Dean Witter*, 470 U.S. at 221, and that this requirement includes the mandate to enforce "such agreements according to their terms," *Volt*, 489 U.S. at 479; see also *Perry*, 482 U.S. at 490-91 (citing cases). This Court's decisions in *Dean Witter* and *Volt* are instructive. In *Dean Witter*, the Court explained that "agreements to arbitrate must be enforced, absent a ground

---

[2] *See Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272, 281 (1995); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984).

for revocation of the contractual agreement." 470 U.S. at 218. In doing so, the Court rejected the suggestion that "the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims," *id.* at 219, instead making clear that the FAA "was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered," *id.* at 220. Thus, the *Dean Witter* Court concluded that "[t]he pre-eminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Id.* at 221.

Similarly, in *Volt*, the Court explained that the FAA, as applied in a case arising in California state court, ensures that "private arbitration agreements are enforced according to their terms" and "pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" 489 U.S. at 478 (quoting *Southland*, 465 U.S. at 10). Thus, although Congress was aware that the FAA "would encourage the expeditious resolution of disputes," the Court explained that Congress was motivated first and foremost by a "desire to 'enforce agreements into which parties had entered.'" *Id.* at 478 (quoting *Dean Witter*, 470 U.S. at 220). As a result, the *Volt* Court concluded that the FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Id.* (citation omitted). Rather, what the FAA requires is that courts "'rigorously enforce'" arbitration "agreements according to their terms" and thereby "give effect to the contractual rights and expectations of the parties." *Id.* at 479 (quoting *Dean Witter*, 470 U.S. at 221).

Since *Volt*, the Court has made clear, repeatedly, that under the FAA, federal and state courts must ensure that written arbitration agreements are enforced in accordance with their

language. Thus, in *Allied-Bruce*, the Court explained that the FAA was designed to require "courts to enforce [arbitration] agreements into which parties had entered, and to place such agreements upon the same footing as other contracts." 513 U.S. at 271 (internal quotation marks and citation omitted) (alteration in original). In *Mastrobuono*, the Court reiterated that "the central purpose of the [FAA]" is "to ensure "that private agreements to arbitrate are enforced according to their terms.'" 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479). In *First Options*, the Court confirmed that "the basic objective" of the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." 514 U.S. at 947 (internal quotation marks and citations omitted). In *Doctor's Associates*, the Court reaffirmed that the "very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. at 688 (alteration in original). And, most recently, in *Waffle House*, the Court explained that the "FAA directs courts to place arbitration agreements on equal footing with other contracts" and ensures "the enforcement of private contractual arrangements." 534 U.S. at 293, 294.[3]

This unbroken line of authority makes clear that courts may not, in furtherance of goals of efficiency or judicial economy, rewrite, modify or attempt to improve upon the terms of a written arbitration agreement governed by the FAA. A contrary rule would render Section 2 largely meaningless, because, if courts were permitted to modify or rewrite private arbitration agreements to suit their views of "efficiency" or "judicial economy," then they could, in the guise of

---

[3] *See also Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2003) (Thomas, J., concurring in judgment) ("[U]nder the [FAA] courts must enforce private agreements to arbitrate just as they would ordinary contracts: in accordance with their terms.").

"enforcing" an arbitration agreement, impose obligations and requirements that the private parties to the agreement had not imposed upon themselves. That result runs headlong against the core principle that "'[a]rbitration under the [FAA] is a matter of consent, not coercion.'" *Id.* at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479).

The requirement that written arbitration agreements should be enforced according to their terms also follows from Section 2's last clause, which requires that such agreements be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, this provision places "arbitration agreements 'upon the same footing as other contracts.'" *Scherk*, 417 U.S. at 511 (quoting H.R. Rep. No. 68-96, at 2 (1924)); see *Volt*, 489 U.S. at 474 (same). That is, under Section 2, a State "may regulate . . . arbitration clauses[] under general contract law principles," but it "may not . . . decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281; see *Doctor's Assocs.*, 517 U.S. at 686-87. Thus, the "basic objective" of Section 2 of the FAA is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (citations and internal quotation marks omitted). See *Volt*, 468 U.S. at 478 (FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms"). Because the FAA guarantees that arbitration under the FAA—including the terms under which the arbitration occurs—"'is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294, it is the parties who determine whether—and how—to arbitrate. See *Mastrobuono*, 514 U.S. at 57-58; *Volt*, 489 U.S. at 476, 478-49.

3. It follows that the FAA prohibits courts from rewriting an arbitration agreement, without regard to the intent of the

parties, in an effort to promote the court's own notions of appropriate public policy. Indeed, one of the problems Congress sought to resolve through the FAA was that States often would permit arbitration only under statutory terms dictated by state law, an approach that Congress considered to be "inadequate[]." *Southland*, 465 U.S. at 14. Thus, a court's expressed desire to further efficiency or economy cannot, consistent with Section 2 of the FAA, justify rewriting the parties' arbitration agreement. See *Moses H. Cone*, 460 U.S. at 20 (FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement"); see also *Dean Witter*, 470 U.S. at 221 (FAA requires that courts "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *First Options*, 514 U.S. at 947 (FAA's "basic objective . . . is not to resolve disputes in the quickest manner possible . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties") (internal quotation marks and citations omitted).

Just as the FAA prohibits rewriting the terms of an enforceable contract in the name of efficiency, so also it prohibits doing so in the name of equity or the protection of special categories of individuals. For example, in *Mitsubishi Motors*, the Court rejected an argument that courts should not interpret arbitration agreements "to encompass claims arising out of statutes designed to protect" a category of individuals unless the agreements expressly "mention the statute giving rise to the claims." 473 U.S. at 625. The Court explained that "as with any other contract, the parties' intentions control," *id.* at 626, and the FAA does not permit "distort[ing] the process of contract interpretation" when claims "implicating statutory rights" are involved, *id.* at 627. A

court may not, consistent with the FAA, "color the lens through which the arbitration clause is read." *Id.* at 628.[4]

Allowing courts to rewrite arbitration agreements without regard for the intent of the parties further ignores that the FAA was enacted to "'reverse the longstanding judicial hostility to arbitration agreements.'" *Waffle House*, 534 U.S. at 289 (quoting *Gilmer*, 500 U.S. at 24); see also H.R. Rep. No. 68-96, at 1 (1924) (FAA designed to "make the [other] contracting party live up to his agreement"). Indeed, to allow a court to inject its own public policy views into an arbitration agreement rather than enforcing the agreement in accordance with its terms would open the door to "the old judicial hostility" to arbitration agreements "in modern and more sophisticated dress." Brief for Am. Bankers Ass'n et al. as *Amici Curiae* in Support of Petition, at 4. Section 2 prohibits such attacks, which seek to "'undercut the enforceability of arbitration agreements.'" *Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 16). Allowing state courts to distort the enforcement of the terms of arbitration agreements would undermine "congressional intent to place arbitration agreements" on an equal footing with other contracts just as do state laws invalidating arbitration contracts. *Southland*, 465 U.S. at 16 n.11.

B. Sections 3 And 4 Of The FAA Do Not Permit State Courts To Rewrite Or Modify The Terms Of Parties' Private Arbitration Agreements.

Contrary to the suggestion of Respondents and the court below, the applicability of these settled legal principles does not depend on whether Sections 3 or 4 of the FAA apply to

---

[4] *See also Allied-Bruce*, 513 U.S. at 280-81 (declining to adopt separate FAA standard with respect to consumer arbitration agreements); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991) (explaining that FAA permits arbitration of "age-discrimination claims").

state courts.[5] That argument wholly ignores that Section 2 of the FAA, which unquestionably applies to state courts, mandates that agreements to arbitrate be enforced as written. See 9 U.S.C. § 2; *Southland*, 465 U.S. at 10; *Allied-Bruce*, 513 U.S. at 272. Moreover, that argument is not relevant to the substantive issue here: whether state courts are permitted to rewrite or modify arbitration agreements and thereby avoid their substantive obligation to enforce the parties' written arbitration agreement as required by Section 2 of the FAA. As shown below, the FAA precludes the analysis employed by the South Carolina Supreme Court.

1. Nothing in Sections 3 or 4 of the FAA supports the decision below to rewrite the parties' agreement. Sections 3 and 4 of the FAA are provisions which require, respectively, that a court grant a party's motion for a stay of litigation "until . . . arbitration has been had in accordance with the terms of the agreement," 9 U.S.C. § 3, and grant a party's motion for "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," *id.* § 4. Further, Section 4 also sets forth a series of procedural matters including (i) the required notice period for a motion to compel arbitration, (ii) the application of the Federal Rules of Civil Procedure to such a motion, and (iii) summary procedures for resolving any dispute over "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same." *Id.* Nothing in Sections 3 or 4, however, modifies the substantive requirements of Section 2 of the FAA or otherwise relieves a court of its obligation to enforce

---

[5] *See* Opp. 17 (arguing that the court below "reasonably questioned whether Section 4 even applies to state court decisions regarding arbitrations"); *id.* at 14 (arguing that FAA imposes no "procedural requirements on state courts" and that States therefore are "free to determine whether, under state law, arbitrations may proceed on a class-wide basis"); *id.* at 10 (noting that court below questioned whether Section 4 of the FAA applied in state court).

a written arbitration agreement to which the FAA applies. See *id.* § 2.

This Court frequently has noted that the applicability of Sections 3 or 4 of the FAA to proceedings in state courts remains an open question.[6] Nevertheless, since *Southland*, the Court has never retreated from the conclusion that the core requirement of the FAA—that written agreements to arbitrate that are subject to the FAA must be enforced—applies both in state and federal courts. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 688; *Allied-Bruce*, 513 U.S. at 272; *Volt*, 489 U.S. at 479; *Perry*, 482 U.S. at 490 (FAA mandates that agreements "be 'rigorously enforce[d]'") (alteration in original) (quoting *Dean Witter*, 470 U.S. at 221). Indeed, even though *Southland* itself expressly left open the question whether Sections 3 and 4 of the FAA applied in state courts, 465 U.S. at 16 n.10, the Court nevertheless ruled that Section 2 of the FAA binds state courts.[7]

---

[6] For example, in *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court stated that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act" but thought it "less clear . . . whether the same is true of an order to compel arbitration under § 4 of the Act." *Id.* at 26. In *Southland*, the Court explained, in holding that Section 2 applied to state courts, that it was not holding that Sections 3 and 4 applied, and it added that the Federal Rules of Civil Procedure "do not apply" in "proceedings to compel arbitration." 465 U.S. at 16 n.10. In *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), the Court reiterated that the applicability of Sections 3 and 4 in state courts remained an open question. *Id.* at 477 n.6.

[7] Nor does this case implicate or resurrect the issue whether a state court must specifically "enforce[]" arbitration agreements under Section 2. *See generally Allied-Bruce*, 513 U.S. at 294 (Thomas, J., dissenting); *Southland*, 465 U.S. at 31-33 (O'Connor, J., dissenting). To the contrary, even if Sections 3 or 4 of the FAA did not apply, South Carolina law itself requires that arbitration agreements must be specifically performed. S.C. Code Ann. § 15-48-20(a) ("[o]n application of a party showing an agreement . . . and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration").

Similarly, interpreting the substantive provision of Section 2 to prohibit courts from rewriting or modifying private agreements to arbitrate in no way conflicts with the matters reflected in Sections 3 and 4. Any overlap between the requirements of Section 2, on the one hand, and Sections 3 and 4, on the other, merely reflects that Congress sought to ensure that arbitration agreements would be "'rigorously enforce[d],'" *Perry*, 482 U.S. at 490 (alteration in original) (quoting *Dean Witter*, 470 U.S. at 221) "according to their terms," *Volt*, 489 U.S. at 479, notwithstanding the "'judiciary's longstanding refusal to enforce agreements to arbitrate,'" *id.* at 478 (quoting *Dean Witter*, 470 U.S. at 219-20). Moreover, it simply makes no sense to conclude that Congress, by enacting Sections 3 and 4, sought, by negative implication, to create a two-tiered system whereby arbitration agreements in state court may be modified based upon those courts' public policy preferences but the same agreements, reviewed in federal court, must be enforced in accordance with their terms.

Indeed, just two years ago, in *Circuit City*, this Court rejected the argument that Section 1 of the FAA should be interpreted in a manner that would "undo" the scope "of the FAA's coverage in § 2." 532 U.S. at 122; see also *Allied-Bruce*, 513 U.S. at 280. As the Court explained in *Southland*, "[w]e are unwilling to attribute to Congress the intent . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. Thus, regardless of whether Sections 3 and 4 apply in state courts, there can be no doubt that the FAA, through Section 2, requires those courts to enforce arbitration agreements according to their written terms.

2. The question whether Sections 3 and 4 of the FAA apply by force of law to state courts is academic here for the additional reason that the parties agreed that those provisions would govern their arbitration agreement. This Court's

decision in *Volt* establishes that where "the parties have agreed to abide by" certain "rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." 489 U.S. at 479. *Volt* explained that the FAA permits "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Id.* It follows, *a fortiori*, that the FAA also permits the parties to agree to arbitrate under the FAA itself.[8]

The arbitration agreement at issue here did just that, thereby creating an additional, independent basis for concluding that the courts below were required to enforce the parties' agreement in accordance with its terms. Specifically, the arbitration agreement provided: "This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1." Pet. App. 110a; see *id.* at 11a n.9. There can be no serious dispute on this point because even the court below noted that the parties "agree the FAA applies . . . to the arbitration agreements in both cases," *id.* at 11a, and added that it had "previously held Green Tree's arbitration clause was governed by the FAA," *id.* at 11a n.9 (citing *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360 (S.C. 2001)). In turn, the *Munoz* decision recognized that private parties' agreement that the "arbitration agreement . . . shall be governed by the FAA" means that the "[a]rbitration agreement[], like other

---

[8] As such, the conclusion that the court below was obligated to enforce the parties' agreement in accordance with its terms is fully supported by lower court cases which rely upon the language of Section 4 of the FAA to prohibit consolidated or class arbitration absent contractual authorization to do so. *See, e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (holding that FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure); *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that a "district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation").

contracts, [is] enforceable in accordance with [its] terms." *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360, 363-64 (S.C. 2001). Indeed, the decision below further recognized the applicability of the FAA by applying Section 10 of the FAA, 9 U.S.C. § 10, in reviewing the arbitral awards. Pet. App. 23a-24a.

Accordingly, the parties' arbitration agreement expressly provides that it "shall be governed by the Federal Arbitration Act," Pet. App. 110a, including Sections 3 and 4. These provisions confirm that the court below was required to enforce the parties' private arbitration clause "in accordance with the terms of the agreement." 9 U.S.C. §§ 3, 4.

II. THE IMPOSITION OF CLASS ARBITRATION ONTO THE AGREEMENTS AT ISSUE, WHICH DO NOT PROVIDE FOR CLASS ARBITRATION, VIOLATED THE FAA.

The judgment of the South Carolina Supreme Court should be reversed because the imposition of class arbitration onto the arbitration agreements in this case is contrary to the bedrock requirements of the FAA. Respondents cannot avoid that result by arguing that the arbitrator exercised "independent judgment" to conclude that class arbitration was consistent with the arbitration agreements. Opp. 25. In the *Bazzle* proceedings, the class arbitration was imposed on the parties and the arbitrator by the South Carolina trial court, and Respondents, throughout these proceedings, affirmatively sought to intertwine *Bazzle* with the *Lackey* proceedings. In all events, the awards must be set aside because the imposition of class arbitration cannot be reconciled with the arbitration agreements. The parties' agreements do not authorize the arbitrator to resolve (i) disputes involving individuals other than the actual parties to the Bazzles' or Lackey Contracts, or (ii) disputes arising from or relating to *other* contracts.

A. The South Carolina Supreme Court's Decision Violated The FAA By Allowing Courts To Impose Their Views Of Equity And Efficiency Onto The Parties' Arbitration Agreements.

The judgment below cannot be reconciled with the FAA's requirement that courts must enforce the parties' written arbitration agreements and may not modify or rewrite those agreements based upon the court's own views of public policy. Under the FAA, arbitration is a matter of "'consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479). The decision below directly contravened that bedrock principle by imposing class action arbitration without regard for the parties' contractual intent.

Rather than attempting to divine the intent of the parties, the court below concluded that it was authorized to supplement the arbitration agreement based upon its own views of public policy. Indeed, the court held that "class-wide arbitration may be ordered when the arbitration agreement is silent *if* it would serve *efficiency* and *equity*, and would not result in *prejudice*." Pet. App. 22a (emphases added). In reaching that result, the court below displayed a hostility to private arbitration agreements by relying on prior South Carolina precedent which held that "a state court may order *consolidation* of claims subject to mandatory arbitration *without any contractual* or statutory *directive to do so*." *Id.* at 21a (citing *Episcopal Hous.*, 255 S.E.2d at 452) (second emphasis added). Because this case law "permit[ted] consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.* where there is no "contractual . . . directive to do so"—the court below reasoned that "it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less *intrusion upon the contractual aspects of the relationship*." *Id.* (internal quotation marks omitted) (emphasis added).

But the FAA does not permit *any* "intrusion upon the contractual aspects of the relationship," Pet. App. 22a,

because "'[a]rbitration under the [FAA] is a matter of consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479). Under the analysis of the court below, however, any perceived "omission" or "silence" in an arbitration agreement provides an invitation for the court to impose on the parties its own notions of "efficiency and equity." Pet. App. 22a; *id.* ("hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy"). That analysis is precluded by the FAA. In particular, although courts in litigation, armed with the coercive power of the state, may consolidate cases or approve class actions even when litigants object, *e.g.*, Fed. R. Civ. P. 23; *id.* 42, the FAA prohibits them from doing likewise in arbitration, in which all power derives from parties' contractual consent.

Put another way, the FAA does not permit courts to transform private arbitration into litigation. "After all, the basic objective in this area [arbitration] is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," *First Options*, 514 U.S. at 947 (citation omitted), but to "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt*, 489 U.S. at 478. Indeed, the FAA demands "rigorous[]" enforcement of arbitration agreements, *Dean Witter*, 470 U.S. at 221, including "piecemeal resolution when necessary to give effect to an arbitration agreement," *Moses H. Cone*, 460 U.S. at 20.

Here, the effect of imposing a class-action arbitration is to convert a simple two-party dispute about a specific state statutory requirement into a massive proceeding with millions of dollars at stake and the full trappings of the process under Rule 23. No one can doubt that the parties to an arbitration could agree to proceed in such fashion. But in this case they did not, and it is flatly inconsistent with both the FAA's requirement of fidelity to the contract's language and the FAA's policy of providing a more efficient resolution of the

particular dispute being arbitrated to transform a bilateral dispute into a complex class action.

Nor does the FAA require parties to include in their arbitration agreement a comprehensive, point-by-point catalog of the matters that the parties expressly do not want courts to impose on their agreement. But that is the practical effect of the decision below. Requiring the parties to an arbitration agreement to anticipate every possible revision that a court might want to impose would frustrate the goals of the FAA by increasing the costs associated with arbitration and impairing the ability of parties to enter into simple, straightforward arbitration agreements. These additional costs and burdens can be avoided if the FAA is applied to require "courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478.

Finally, the court below concluded that imposition of class-action arbitration was justified because the "parties with nominal individual claims . . . would be left with no avenue for relief." Pet. App. 22a. As this Court noted in *Allied Bruce*, however, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." 513 U.S. at 280. More recently, this Court has reconfirmed that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance" where a case "involves smaller sums." *Circuit City*, 532 U.S. at 123. Moreover, the court ignored that the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus their costs and significant attorney's fees. As this Court has explained, such claims fall within the heartland of arbitral dispute resolution. *Allied-Bruce*, 513 U.S. at 280 (noting that "one-third of [the American Arbitration Association's] claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000"). Indeed, the Bazzles initially filed suit

individually, seeking recovery of "actual and punitive damages, statutory damages and penalties, treble damages, attorneys' fees, costs and expenses." Rec. on Appeal at 1374. They did not require the action to be brought as a class to justify coming forward to seek a remedy.

In sum, the decision below cannot be reconciled with the FAA's requirement that courts must enforce written arbitration agreements and may not rewrite them. See 9 U.S.C. § 2. In lieu of enforcing the terms of the parties' agreement, the court below instead concluded that South Carolina law authorized an "'intrusion upon the contractual aspects of the relationship,'" Pet. App. 21a, if that intrusion, in the court's view, would "serve efficiency and equity" as well as "judicial economy." *Id.* at 22a. By distorting the parties' agreement to suit its own policy preferences, the court below violated the FAA by resurrecting the very judicial hostility to private arbitration that the FAA was enacted more than 75 years ago to eliminate.

B. The Trial Court's Imposition Of Class Arbitration Onto The Parties' Agreements In Violation Of The FAA Infected The Arbitrations.

As shown above, the imposition of class arbitration without "any contractual directive to do so" plainly violates the requirements of the FAA. Respondents cannot avoid application of that principle here by arguing that that "the *Arbitrator* decided that this case should proceed as a class arbitration." Opp. 25. More specifically, according to Respondents, "this case was not a situation of the South Carolina courts imposing their views on arbitration, but rather the *Arbitrator* making the decision to proceed with a class arbitration." *Id.* That argument should be rejected because it ignores the course of the proceedings in these two interrelated arbitrations.

In the *Bazzle* proceedings, the decision to impose class arbitration on the parties (and the arbitrator) unquestionably

was made by the court. On December 5, 1997, the trial court both ordered arbitration to proceed and entered "an order granting class certification." Pet. App. 3a. Thereafter, on January 7, 1998, the trial court "ordered that the class action in arbitration proceed on an opt-out basis." *Id.* at 4a. Only after class arbitration had been ordered did the South Carolina trial court appoint Thomas Ervin to preside over the class arbitration that it had previously ordered. *Id.* Respondents recognized these facts when they argued to the trial court below that "this Court determined in this matter that the matter could proceed as a class action." J.A. 31. Indeed, they argued that "to the extent that Judge Ervin [the arbitrator] made such a decision, if any, in this case or the *Lackey* case, it was a reaffirmation and/or adoption of this Court's prior determination." *Id.* at 32 n.2.

That decision to impose class arbitration violates the FAA because, as Respondents acknowledge here, "[n]either the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions." Opp. 5. Because the trial court in the *Bazzle* proceeding imposed class arbitration on the parties' private arbitration agreement without any contractual directive to do so, this case does not implicate the policies that underlie deference to arbitrator decisions regarding the merits of a dispute that the parties have agreed to arbitrate. Any such deference is predicated on the notion that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). Such deference cannot apply where, as here, the trial court imposed class arbitration onto Green Tree even though the arbitration agreement does not provide for class arbitration and its language focuses solely on a specific dispute arising between the parties to the contract and no

others.[9] Accordingly, the arbitral award entered in the *Bazzle* arbitration must be set aside because that proceeding was infected from the outset by a clear violation of the FAA's requirement that courts may not impose their public policy choices onto the course of an arbitration proceeding absent a contractual directive to do so. See 9 U.S.C. § 2.

Nor can the impact of that FAA violation be limited to the *Bazzle* proceeding. As Respondents recognize, the two proceedings were intimately related to one another because the same arbitrator decided both the *Bazzle* and *Lackey* arbitrations, and because both arbitrations were born of "identical arbitration clauses." Opp. 25 n.6. Indeed, below, Respondents affirmatively argued, successfully, that the class arbitration ordered by the court in *Bazzle* should control whether class arbitration should be imposed in *Lackey*. In particular, after the trial court had ordered class arbitration in the *Bazzle* proceedings and appointed Thomas Ervin to serve as the arbitrator who would implement the court's class arbitration, Respondents, in the *Lackey* proceedings, asked the same arbitrator to adopt the same approach ordered by the *Bazzle* court and to impose class arbitration in *Lackey*.

Specifically, in the *Lackey* matter, Respondents argued to the arbitrator that class-action arbitration should be imposed because:

> [I]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of a class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration.

Rec. on Appeal at 516. Later, Respondents argued to the court below that "to the extent that Judge Ervin made such a decision, if any, in . . . the *Lackey* case, it was a reaffirmation and/or adoption of [the *Bazzle*] Court's prior determination." J.A. at 32 n.2.

Respondents may not now change positions by asserting in this Court that the arbitrator in *Lackey* made an independent determination untainted by the trial court's violation of the FAA. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)); see also 18 James Wm. Moore et al., *Moore's Federal Practice* (MB) § 134.30 (3d ed. June 2002) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). In all events, even if the arbitrator also reviewed the arbitration clause, it is inconceivable that, after being ordered by a court to conduct a class-wide arbitration in *Bazzle*, he would then, in a related arbitration proceeding involving an indistinguishable arbitration clause, independently decide not to impose class arbitration. Indeed, there was no effort by the arbitrator to reconcile class arbitration with the express limitations in the contract.

In short, the judgment below must be set aside precisely because this was a case of the South Carolina courts, without contractual directive to do so, impermissibly "imposing their views on arbitration." Opp. 25.

---

[9] Contrary to the claims of the South Carolina Supreme Court below, Pet. App. 23a, and of Respondents, Opp. 25-28, review, as here, of an arbitrator's authority pursuant to Section 10(a)(4) of the FAA is not the same as review of the *merits* of an arbitrator's award. *See First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995) (separately discussing Section 10 of FAA and "'manifest disregard' of law" review as bases for vacating award).

C. In All Events, Class Arbitration Cannot Be Reconciled With The Terms Of The Arbitration Agreements In This Case.

The Federal Arbitration Act provides that a court may vacate the award of an arbitrator, *inter alia*, "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4); see *First Options*, 514 U.S. at 942 (summarizing bases for setting aside arbitrator's award). This Court has been clear that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (citing *Gateway Coal Co.* v. *United Mine Workers of Am.*, 414 U.S. 368, 374 (1974)). Applying these standards, even if the arbitral proceedings had not been tainted from the outset by the trial court's imposition of class-wide arbitration, the judgment below still must be reversed, because the conduct of class arbitration significantly exceeds the authority granted to the arbitrator and fundamentally transforms the scope of the arbitration agreements in manifest disregard of the parties' intent.

1. The Terms Of The Arbitration Agreements Preclude Class-Wide Arbitration.

As this Court has explained, "by agreeing to arbitrate, a party 'trades the procedures . . . of the courtroom for the simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). To be sure, the FAA leaves parties "free to structure their arbitration agreements as they see fit," *Volt*, 489 U.S. at 479, and "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," *id.* at 478 (citation omitted). At bottom, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Techs.*, 475 U.S. at 648

(quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

Class-wide arbitration is fundamentally inconsistent with the arbitration agreements in this case. As Respondents acknowledge, "[n]either the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions." Opp. 5. Instead, the agreements provide that "disputes, claims or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a. "This contract" refers, of course, to the specific contract entered into by the buyer and seller in these agreements. In light of this context, it is not surprising that the arbitration agreement is structured to provide for bilateral arbitration between two contractually defined parties: "you" and "us." *Id.* Both of these contractually defined parties are reserved a role in the selection of the single arbitrator—*i.e.*, "selected by us with consent of you"—who will resolve their dispute. *Id.* Moreover, the scope of that bilateral arbitration agreement is limited to resolving disputes "arising from or relating to this contract"—*i.e.*, disputes arising from or relating to the contract between "you" and "us." *Id.*[10]

Class arbitration, by contrast, cannot be reconciled with the decision of the parties to arbitrate in general or with the terms of the parties' agreement.[11] As a general matter, class

---

[10] The court below stated, without any analysis or elaboration, that this "language does not limit the arbitration to non-class arbitration" and "[a]t best, it creates an ambiguity." Pet. App. 19a. The court below never identified why this language was ambiguous or tried to reconcile its reading with the specific terms of the agreement.

[11] *See Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (relying upon Restatement (Second) of Contracts § 202(2) (1979) for the principle that "[a] writing is interpreted as a whole"); *United States* v. *Utah*, 199 U.S. 414, 423 (1905) ("'The elementary canon of interpretation is, not that particular words may be isolatedly considered,

arbitration is not the type of dispute-resolution proceeding that one would contemplate adopting to provide "a less expensive alternative to litigation" or a means of avoiding the "'delay and expense of litigation.'" *Allied-Bruce*, 513 U.S. at 280; see *Circuit City*, 532 U.S. at 123. Indeed, the agreement states that "[t]he parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration." Pet. App. 110a. It makes little sense to presume that the parties sought to avoid court litigation, but then authorized the arbitrator to recreate the most complex, expensive and time-consuming aspects of litigation within their private arbitral process. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985) (explaining that in a class action, absent class members must be afforded notice, an opportunity to be heard and to participate in the litigation, and a chance to opt out); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (describing pre-requisites to proposed class-action settlement).[12]

---

but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them'").

[12] Indeed, even the minority of courts that appear to allow class-action arbitration agree on the necessity of significant court involvement to protect the rights of absent class members. *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (stating that the court, not arbitrators, would conduct class certifications in arbitrations, would monitor representation and approve proposed settlements), *rev'd in part*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (stating that in a class action arbitration, the trial court would have to certify the class, supervise the notice, and "probably have to have final review in order to insure that class representatives adequately provide for absent class members"); *cf.* 5 James Wm. Moore et al., *Moore's Federal Practice* (MB) § 23.25[3][d] (3d ed. June 2002) ("Because absent parties will be bound by the judgment in a class action, courts are required to undertake a continuing examination of the adequacy of representation at all stages of the litigation.") (internal citation omitted).

Indeed, forced class arbitration creates a bizarre and dangerous hybrid that imposes the expense and delay of court litigation without the necessary due-process safeguards of court involvement and review in proceedings where class representatives purport to act on behalf of other individuals. Thus, for example, under Federal Rule of Civil Procedure 23(b)(3), class certification can be authorized only if, after undertaking a "rigorous analysis," a court "finds" that the prerequisites for class certification have been met and the class action may be managed without impairing any party's substantive rights. See *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982).

Unlike class actions prosecuted in federal or state courts, class arbitrations lack the essential protections mandated in the courts. In court, absent parties cannot be bound by a judgment unless their due-process rights are adequately protected through judicial oversight. See *Hansberry* v. *Lee*, 311 U.S. 32, 41-42 (1940); see also *Shutts*, 472 U.S. at 808. That oversight begins, as mentioned above, with a "rigorous" analysis whether the class certification standards have been met, continues to ensure that there is notice "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), and concludes with oversight of the voluntary dismissal or compromise of a class action, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997); *Ortiz*, 527 U.S. at 848.[13] In contrast, arbitration lacks such

---

[13] For example, under Federal Rule of Civil Procedure 23, parties seeking class certification must demonstrate that they meet several requirements, namely, numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *see also Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625-28 (1997) (holding that adequacy was not demonstrated because of the diverse groups of plaintiffs). The parties seeking certification must then show that the action is maintainable under the rules that limit the realm of lawsuits that can be brought as class

safeguards because "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). As a result, class arbitration raises difficult legal and practical questions that should not be addressed unless there is compelling evidence to conclude that the parties actually chose this means of resolving not only their own disputes but also those of other individuals.[14]

The unlikely conclusion that the parties authorized class-action arbitration here is foreclosed by the language of their arbitration agreements. On the one hand, a class action allows a class representative to litigate claims on behalf of himself as well as numerous additional individuals who are not parties to the litigation. See Fed. R. Civ. P. 23. For instance, in the proceedings below, the Bazzles and Lackey litigated not only the specific disputes arising from their respective contracts, but also litigated, on behalf of 3,700 other individuals, disputes arising under or relating to 3,700 *other* contracts. That wholesale expansion of the arbitration agreements runs contrary to the terms of the agreements, which limit the scope of each arbitration proceeding to disputes between "you" and "us," and limit the subject matter to disputes arising from or relating to "this contract" between

---

actions. *See, e.g.*, Fed. R. Civ. P. 23(b)(1)-(3). Under Rule 23(b)(3), for instance, the action must meet two more requirements: common questions must predominate, and class resolution must be a superior method for the fair and efficient adjudication of the controversy. *Id.* 23(b)(3); *Amchem*, 521 U.S. at 623-25 (finding that the predominance requirement was not met in an asbestos case under Rule 23(b)(3)).

[14] 12 Am. Jur. *Contracts* § 251 ("An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous."); *Restatement (Second) of Contract Law* § 203(a) (1981) (stating preference in contract interpretation that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

"you" and "us." Pet. App. 110a. One of the core ways in which an arbitrator can exceed his authority is to purport to bind in arbitration parties who have not agreed to be bound. See, *e.g.*, *First Options*, 514 U.S. at 942 (affirming vacatur of arbitrator's decision as applied to parties who had not personally signed an arbitration agreement).[15] Here, class action arbitration exceeds an arbitrator's authority under the express terms of the arbitration agreements.

Nor is that expansion of the arbitrator's authority somehow remedied by an "opt-out" provision that allows non-class representatives to avoid arbitration by opting out of the class. Pet. App. 4a. To the contrary, the opt-out provision further frustrates the parties' intent by rewriting the mechanism by which they will choose an arbitrator. Under the agreement, each arbitrator is "selected by us with consent of you." *Id.* at 110a. The opt-out provision allows a single arbitrator to deny Green Tree its right to select, in the first instance, the individual who would have authority to resolve the disputes arising from or relating to each specific contract.

For the same reason, imposition of class arbitration is not an incidental arbitral power granted to the arbitrator under the parties' agreement. Here, the agreement limits the arbitrator's

---

[15] The courts of appeals also have regularly vacated arbitral awards when the arbitrator attempted to arbitrate the claims of parties not included in the arbitration agreement before him. *See, e.g.*, *NCR Corp.* v. *Sac-Co., Inc.*, 43 F.3d 1076 (6th Cir. 1995) (affirming vacatur of arbitrator's punitive damages award because arbitrator awarded the damages to others who had signed an agreement with defendant but had not brought arbitration proceeding against defendant); *Eljer Mfg., Inc.* v. *Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994) (vacating arbitrator's damages award when it was based on losses suffered by an entity that did not bring arbitration proceeding against defendant; arbitration "cannot be construed to delegate to the arbitrator the power to arbitrate disputes between Eljer and a third party"); *Pacific Reinsurance Mgmt. Corp.* v. *Ohio Reinsurance Corp.*, 935 F.2d 1019, 1026-27 (9th Cir. 1991) (arbitrators do not have power to add new parties to arbitration proceedings without the consent of all parties).

authority to disputes between the parties to the contract "arising from or relating to this contract." Pet. App. 110a. Although the granting of that authority to the arbitrator is entirely consistent with an arbitrator's decision to schedule hearings, permit or limit discovery, or issue a scheduling order, imposition of class arbitration is fundamentally different because it would expand the arbitrator's authority both to individuals who are not parties to the Bazzle or Lackey Contracts and to disputes that arise not from "this contract" but from *other* contracts. *Id.* at 110a. As this Court explained in *Mastrobuono*, an arbitration agreement "should be read to give effect to all its provisions and to render them consistent with each other." 514 U.S. at 63.

2. *Waffle House* Confirms That Class Arbitration Cannot Be Imposed Onto The Parties' Agreements.

Nor can class arbitration be imposed onto the parties' agreements based upon generalized presumptions in favor of arbitration. See Opp. 15. This Court's decision in *Waffle House* is instructive. There, the Court explained that the "FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" 534 U.S. at 293 (quoting *Volt*, 489 U.S. at 478). In *Waffle House*, the lower court ruled that the EEOC could not seek victim-specific relief in a lawsuit under the Americans with Disabilities Act because the employee (Baker) on whose behalf the EEOC was proceeding had signed an arbitration agreement with Waffle House. *Id.* at 284. This Court reversed, explaining that under the FAA, "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." *Id.* at 294. The Court underscored that courts cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.*

Applying these principles, the Court explained that the arbitration agreement in no way limited the EEOC's lawsuit because "[i]t goes without saying that a contract cannot bind a nonparty." *Id.*

This case is no different. Here, as in *Waffle House*, "there is no ambiguity" in the contract, *id.*, because the non-representative class members are not parties to the arbitration agreement or contract through which the arbitrator was chosen in the *Bazzle* or *Lackey* proceedings. Just as the arbitration agreement between Baker and Waffle House could not bind the EEOC (even though the EEOC sought relief on behalf of Baker), here too the arbitration agreement cannot bind the non-representative class members who are not parties to the specific arbitration agreements upon which the *Bazzle* and *Lackey* proceedings were predicated.

Under the FAA, "[i]t goes without saying that a contract cannot bind a nonparty." *Id.* Here, the agreement states that the parties (*i.e.*, "you" and "us") agree to "binding arbitration in accord with this contract." Pet. App. 110a. Neither Green Tree nor the non-representative class members have agreed, however, to the imposition of class arbitration that would transform the bilateral contract between "you" and "us" into a multilateral contract including a multilateral dispute resolution mechanism between Green Tree, on the one hand, and more than 3,700 individuals on the other. Simply put, the imposition of class arbitration plainly exceeded the arbitrator's (and *a fortiori* the court's) power by transforming the parties' bilateral contract dispute provision into a mechanism for resolving disputes arising from *other* contracts and *other* parties.

CONCLUSION

For these reasons, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
VIRGINIA M. VANDER JAGT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

February 24, 2003

ADDENDA

RELEVANT STATUTES

---

9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may

specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub. L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub. L. 102-354, § 5(b)(4), 106 Stat. 946; May 7, 2002, Pub. L. 107-169, § 1, 116 Stat. 132.)

(20)

No. 02-634

Supreme Court, U.S.
FILED
MAR 27 2003
CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS

MARY LEIGH ARNOLD
MARY LEIGH ARNOLD, P.A.
P.O. Box 265
Mt. Pleasant, SC 29465

STEVEN W. HAMM
RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, SC 29202

CORNELIA T.L. PILLARD
Counsel of Record
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave, NW
Washington, D.C. 20001
(202) 662-9391

Counsel for Respondents
[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

BRADFORD P. SIMPSON
D. MICHAEL KELLY
B. RANDALL DONG
SUGGS & KELLY LAWYERS, P.A.
P.O. Box 8113
Columbia, SC 29202-0008

T. ALEXANDER BEARD
BEARD LAW FIRM
1002 Anna Knapp Blvd
Mt. Pleasant, SC 29464

CHARLES L. DIBBLE
DIBBLE LAW OFFICES
P.O. Drawer 1240
Columbia, SC 29202

CHARLES L.A. TERRENI
P.O. Box 11904
Columbia, SC 29211

DANIEL WEBSTER WILLIAMS
BEDINGFIELD & WILLIAMS
P.O. Box 616
Barnwell, SC 29812

CHARLES RICHARD KELLY
C. RICHARD KELLY, PA
Post Office Box 11648
Columbia, SC 29211

THOMAS MATTHEW FRYAR
2614 BURNEY DR.
COLUMBIA, SC 29205

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., divests a state court of authority to allow an arbitrator to decide state-law claims on a class-wide basis in accordance with the arbitration agreement and state law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
SUMMARY OF ARGUMENT	17
ARGUMENT	20
I. THE SOUTH CAROLINA SUPREME COURT'S DECISION TO PERMIT ARBITRATION OF CLASS CLAIMS FULLY COMPORTS WITH THE FAA	20
A. Under the FAA, State Law and Arbitrator Discretion Supply Rules of Arbitration Procedure Not Specified in an Agreement to Arbitrate	20
B. FAA § 2 Preemption Is Limited to Ensuring that State Law Does Not Disfavor Arbitration	22
II. THE FAA DOES NOT ESTABLISH A FEDERAL COMMON LAW OF CONTRACT INTERPRETATION UNDER WHICH THE ARBITRATION AGREEMENT'S REFERENCE TO "THIS CONTRACT" WOULD FORECLOSE CLASS ARBITRATION	26
A. Under the FAA, General Principles of State Law Govern Questions of Interpretation of Arbitration Agreements	27
B. The State Court Faithfully Applied State Law To Hold That The Agreement Permitted Class Arbitration	30

TABLE OF CONTENTS—Continued

Page

1. The State Court's Decision Is Strongly Supported By State Law and the Terms of the Agreement 31

2. There is No Basis for Petitioner's Contention That The State Court "Rewrote" The Parties' Agreement in Order To Serve its Own Policy Preferences 36

III. THE FAA DOES NOT CREATE A FEDERAL PRESUMPTION AGAINST CLASS ARBITRATION THAT WOULD FORECLOSE CLASS ARBITRATION HERE 37

A. The FAA Does Not Preempt State Court Procedures For Multiparty Arbitration 38

B. Congress Acted Reasonably in Not Blocking Class Arbitration 46

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Allied-Bruce Terminix Cos., Inc., v. Dobson, 513 U.S. 265 (1995) 24, 28, 43

Amchem Prods. v. Windsor, 521 U.S. 591 (1997) 49

American Airlines v. Wolens, 513 U.S. 219 (1995) 26-27

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 41

Blue Cross of California v. Superior Court, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998) 38

Boynton v. Carswell, 233 S.E. 2d 185 (Ga. 1977) *overruled on other grounds by Callaway v. Carswell*, 242 S.E.2d 103 (Ga. 1978) 38

Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 16, 40, 43, 45

Connecticut General Life Ins. Co. v. Sun Life Assurance Co. v. Canada, 210 F.3d 771 (7th Cir. 2000) 33, 36

Deposit Guaranty Nat. Bank v. Roper, 446 U.S. 947 (1980) 49

Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. 1991) 33, 38

Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) 24

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 48

English v. General Elec. Corp., 496 U.S. 72 (1990) 23

Episcopal Housing Corp. v. Federal Ins. Co., 255 S.E.2d 451 (S.C.1979) 15, 31

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 41

TABLE OF AUTHORITIES—Continued

	Page
Evins v. Richland County Historic Preservation Comm'n, 532 S.E.2d 876 (S.C. 2000)	33
Ex Parte Kampis, 826 So. 2d 819 (Ala. 2002)	42
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, (1995)	28-29, 44, 48
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)	23
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	39
Green Tree Financial Corp. of Alabama v. Randolph, 531 U.S. 79 (2000)	23
Gregory v. Ashcroft, 501 U.S. 452 (1991)	41
Hanna v. Plumer, 380 U.S. 460 (1965)	41
Hines v. Davidowitz, 312 U.S. 52 (1941)	23
Howsam v. Dean Witter Reynolds, Inc., 123 S.Ct. 588 (2002)	21
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)	22
Johnson v. Fankell, 520 U.S. 911 (1997)	40, 41
Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982)	38
Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001)	16, 22, 44
Marina Cove Condo. Owners' Assn., 34 P.3d 86 (2001)	42
Mastrobuono v. Shearson Lehman Hutton, Inc, 514 U.S. 52 (1995)	15, 31, 32, 33, 36
Med Center Cars, Inc. v. Smith, 727 So.2d 9 (Ala. 1998)	38
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)	25
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1(1983)	22

TABLE OF AUTHORITIES—Continued

	Page
Myrtle Beach Lumber Co., Inc. v. Willoughby, 274 S.E.2d 423 (S.C. 1981)	15, 30
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994)	28
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)	33
Perry v. Thomas, 482 U.S. 483 (1987)	*passim*
Phillips Petroleum v. Shutts, 472 U.S. 797 (1985)	38, 48, 49
Pittman Mortgage Co. v. Edwards, 488 S.E.2d 335 (S.C. 1997)	16, 22
Plaza Development Services v. Joe Harden Builder, Inc., 365 S.E.2d. 231 (S.C. Ct. App. 1988)	15
Shearson/American Express v. McMahon, 482 U.S. 220 (1987)	25
Southern Atlantic Fin. Services, Inc. v. Middleton, 562 S.E.2d 482, 486 (S.C. Ct. App. 2002)	30
Southland Corp. v. Keating, 465 U.S 1 (1984)	*passim*
State v. Berger, 567 S.E.2d 265 (W.Va. 2002), *cert. denied sub nom Friedman's Inc. v. West Virginia*, 123 S.Ct. 695 (2002)	40
Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957)	40
Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2002)	40
Tilley v. Pacesetter Corp., 508 S.E.2d 16 (S.C. 1998)	6
Volt Info. Sciences Inc., v. Bd. of Trustees, 489 U.S. 468 (1989)	*passim*
Zabinski v. Bright Acres Assocs, 553 S.E.2d 110 (S.C. 2001)	22, 32

TABLE OF AUTHORITIES—Continued

STATUTES	Page
9 U.S.C. § 1	42
§ 2	*passim*
§ 3	42
§ 4	16, 42, 43, 45
§ 7	21
§ 10	17
S.C. Code Ann. §§15-48-10	21
§ 15-48-130	16-17
§ 15-48-130(a)	22
§ 15-48-150	48
§ 37-10-102	5
§ 37-10-102(a)	5
1982 S.C. Act 385 § 56	5
1997 S.C. Act 99 § 5	6
RULES	
Fed. R. Civ. P. 8(c)	48
Fed. R. Civ. P. 23	41, 45
Fed. R. Civ. P. 81(a)(3)	45
S.C.R.C.P. 23	12, 31
OTHER AUTHORITIES	
American Arbitration Association website, http://www.adr.org/index2.1jsp?JSPssid=15739	25
NASD Code of Arbitration Procedure, Section 12(d)(3)	50
Ralph K. Anderson, Jr., SOUTH CAROLINA REQUESTS TO CHARGE - CIVIL, § 19-7 Contract Rules of Construction (2002)	30
Restatement (Second) of Contracts §206 (1981)	31
Sternlight, Arbitration Meets the Class Action, 42 Wm. & Mary L. Rev. 1, 8 (2000)	50

IN THE

Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS

STATEMENT

This case concerns whether the Federal Arbitration Act ("FAA") requires that an arbitration clause, governed by state law and interpreted by the state's highest court to allow class arbitration, be reinterpreted under a new federal standard of FAA contract interpretation to foreclose class arbitration. Green Tree wrote a sweeping arbitration clause in its standard-form adhesion contract and imposed it on respondents when they obtained mortgage-secured financing from Green Tree for home improvements or manufactured housing

in South Carolina. That agreement stated that it would be "governed by the law of the State of South Carolina," R. App. 2162, which permits class arbitration in the absence of contract language specifically forbidding it. Employing standard rules of contract interpretation applicable to all other contracts, the state high court held that Green Tree's clause "does not limit the arbitration to non-class arbitration," Pet. App. 19a, and that South Carolina law permits class-wide arbitration, *id.* at 21a-22a. Under these circumstances, it is consistent with the FAA for respondents to pursue their wholly state-law claims in an arbitration class action.

Years before respondents filed these cases, Green Tree had been held liable to other individuals for the same violations at issue here. Rather than correct its unlawful conduct, Green Tree continued to impose its illegal credit procedure on thousands of additional borrowers. The arbitrator found that Green Tree had engaged in "wilful, wanton and egregious" disregard of state law. Pet. App. 108a. After persisting for years in wholesale violation of the South Carolina Consumer Code ("Consumer Code"), undeterred by successive individual cases, Green Tree opposes class treatment in this case.

When respondents sought redress for Green Tree's predatory lending practices, they were bound by contract to arbitrate before an arbitrator chosen by Green Tree. Respondents filed their two complaints as class actions, and the arbitrator decided to proceed on a class-wide basis in both cases. Green Tree objected to class arbitration, however, asserting that it was foreclosed by the arbitration clause. Every legal decision maker to have considered the question—including the arbitrator himself and the state courts up to and including the South Carolina Supreme Court—has uniformly concluded that the agreement permitted class arbitration, and that respondents' claims were appropriately arbitrated on a class-wide basis. Green Tree now seeks to convert the state-law question of the scope of the arbitration clause into a federal question under

the FAA. That position is untenable. Green Tree advocates a dramatic expansion of the reach of the FAA into routine matters of state law that was never intended by Congress and cannot be squared with this Court's cases.

1. The Arbitration Agreement. Petitioner Green Tree drafted the arbitration agreement at issue in this case and included it in a standard form consumer Retail Installment Contract and Security Agreement ("Agreement"). Green Tree presented the Agreement on a take-it-or-leave-it basis to each member of the respondent class when the prospective borrower sought to purchase manufactured housing or home improvements financed by Green Tree. The underlying claim common to all the class members is thus governed by the same arbitration clause in the same standard-form contract of adhesion.

Green Tree's Agreement barred the use of juries, but otherwise said nothing about procedures for arbitration. Instead, it generally provided that "this contract will be governed by the law of the State of South Carolina." R. App. 2162. South Carolina law permits class arbitration, and neither the arbitration provision nor any other document Green Tree used in the transactions at issue made any reference to waiver of class actions. The arbitration clause stated only that the parties waived their right to a jury trial, both in arbitration and in court. Pet. App. 110a.[1] Not until November 1998, well after the parties had completed the transactions at issue in this case, did Green Tree amend its arbitration clause to require signatories to waive their right to "to participate as a repre-

[1] Green Tree's arbitration clause preserved Green Tree's own right to elect to go to court when *it sought enforcement* of any "mortgage, deed or trust, or other security agreement," yet provided that any such suit would not impair Green Tree's right to compel purchasers to arbitrate their claims, including any counterclaims to claims Green Tree filed in court. Pet. App. 111a.

sentative or a member of any class of claimants pertaining to any claim arising from or relating to this agreement." [2]

Green Tree's Agreement provided for mandatory, binding arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract." The Agreement specifically granted the arbitrator authority over "all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort, and property disputes." The Agreement did not set forth arbitration procedures, but instead conferred on the arbitrator "all powers provided by the law and the contract." Those powers, the agreement stated, "shall include all legal and equitable remedies, including, but not limited to, monetary damages, declaratory relief, and injunctive relief." Pet. App. 110a.

2. The Underlying Claims. The respondent classes assert only state-law, non-diversity claims arising under the Consumer Code. The *Bazzle* and *Lackey* cases, consolidated in the final opinion issued by the South Carolina Supreme Court, began as two class actions arbitrated separately before the same arbitrator. Purchasers of mobile homes comprise the *Lackey* class, and purchasers of home improvements comprise the *Bazzle* class. Both cases involve real-estate secured transactions, all of which Green Tree structured in the same way, using the same agreement, and all of which were affected by the identical violation of state consumer law. As the arbitrator ultimately found, Green Tree violated the class members' rights by systematically ignoring a clear statutory requirement that creditors in real-estate secured transactions

[2] *See* Resp. Reply Brief to *Amici Curiae*, filed in No. 00-CP-18-443 (Supreme Court of South Carolina), at 6 & Attachment A. The validity of those agreements is not at issue in this case.

alert consumers of the need to retain their own lawyers and insurance agents to represent their interests.

a. ***The South Carolina Attorney Preference law***. In 1982, the South Carolina General Assembly ("General Assembly") amended the Consumer Code to relieve creditors of usury restrictions, but sought to protect consumers against predatory lending practices by reinforceing consumers' right to legal representation and insurance advice in real-estate secured transactions. The 1982 Consumer Code amendments eliminated caps on the interest rates that creditors could charge for consumer credit, and authorized creditors to charge certain fees. 1982 S.C. Act 385 § 56. To safeguard consumers, the General Assembly also included a requirement that creditors advise each consumer of his or her right to retain an attorney and insurance agent to provide professional services at the closing of real estate transactions. S.C. CODE ANN. § 37-10-102 (the "Preference Statute").[3] Under the Preference Statute, the creditor was required to record on the first page of each credit application the consumer's chosen representatives. *Id.* The Preference Statute applies to all consumer loans secured by real estate without regard to whether the underlying contract contains an arbitration clause. The General Assembly enacted the Preference Statute to prevent creditors from locking consumers into usurious interest rates or other unfair contract terms and securing those loans with

[3] Section 37-10-102(a) provides, in pertinent part: Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose—(a) The creditor must ascertain the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and . . . the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference, and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower.

the consumer's real estate without the consumer having the benefit of an attorney and insurance agent to give advice. In the absence of professional guidance, consumers often fail to appreciate the terms and the total dollar cost of a "deal," and may remain unaware that a loan will be secured by liens on their real property that can hinder property sale or lead to forfeiture if payment is not timely made. R. App. 1720, 1722.

In May 1997, after both the *Bazzle* and *Lackey* complaints had been filed, the General Assembly amended the Preference Statute. The Preference Statute previously placed no special limits on the right of consumers to proceed against violators on a class-wide basis. *See Tilley v. Pacesetter Corp.*, 508 S.E.2d 16, 21 (S.C. 1998). The statute's pre-1977 penalty provision also provided that violators could be required to forfeit the total amount of the loan finance charge, repay to the consumer double the amount of interest collected, pay costs of the action, and allow the consumer to repay the balance of the loan without any loan finance charges. *See Tilley*, 508 S.E.2d at 36 n.2. The 1997 Preference Statute amendments foreclosed future class actions for violations of the Preference Statute and established a fixed penalty range of $1,500-$7,500. The same amendment, however, expressly directed that all Preference Statute cases "filed as class actions, without regard to certification, prior to May 2, 1997, may proceed." 1997 S.C. Act 99 § 5. *Bazzle* and *Lackey* were both filed before that date, and the General Assembly was aware of the pendency of these and other Preference Statute class actions when it amended the Consumer Code. *See* R. App. 75a.

b. ***The Transactions.*** As noted above, the two cases at issue here involve two types of transactions secured by South Carolina real estate: mobile-home purchase transactions (*Lackey*) and home-improvement transactions (*Bazzle*).

In a typical mobile-home transaction (litigated in *Lackey*), the purchaser entered into a preprinted consumer installment contract and security agreement with Green Tree to buy a mobile home. Green Tree's dealer had the purchaser fill out a Green Tree credit application. The credit application did not include the required Preference Statute disclosure. If Green Tree elected to extend credit, it set the terms of the credit, prepared all the necessary documents for closing, and transmitted the documents to its dealer. The documents included a mortgage prepared by Green Tree. The mortgage, on its face, directed the local recording office to return it directly to Green Tree. No attorney was involved in those transactions, nor were consumers advised of the need to consult counsel. Pet. App. 87a-88a.

The *Bazzle* transaction is typical of a home-improvement transaction. A home-improvement contractor offering financing through Green Tree solicited customers door-to-door, offering home-improvement services. The contractor, acting as a dealer for Green Tree, advised the customer that home improvements could be financed. The customer completed a credit application that was then submitted to Green Tree. The dealer did not disclose the terms of the credit or the encumbrance placed on the purchaser's existing real estate. If the customer agreed to purchase home improvements, the Green Tree dealer returned to the customer's home with the transaction documents. Pet. App. 61a-62a.

All of the transaction documents were standard preprinted form contracts of adhesion prepared by Green Tree. Green Tree set all of the terms of financing, including the rate of interest. The documents, if explained at all, were not prepared or reviewed by any attorney or agent for the purchasers. Green Tree never gave the purchasers the required Preference Statute disclosures. Pet. App. 61a-62a. Many purchasers did not understand that they were securing the credit transaction with a mortgage on their home, and would only discover

Green Tree's mortgage when they attempted to sell or refinance their home. R. App. 1720, 1722.

3. The Proceedings Below

a. ***Lackey v. Green Tree.*** Daniel Lackey filed his class-action complaint in state court on May 28, 1996. He alleged that Green Tree systematically violated the Preference Statute in manufactured-housing and home-improvement transactions secured by South Carolina real estate. Green Tree answered, and the *Lackey* plaintiffs moved for class certification. R. App. 123-124. Green Tree then moved to stay the litigation and compel arbitration, and the trial court denied the motion because it found the arbitration clause unconscionable. Pet. App. 6a.

Green Tree appealed, and on March 3, 1998, the South Carolina Court of Appeals reversed and remanded. Pet. App. 6a. The court of appeals held that the contract was not unconscionable, but agreed with the trial court that it was a contract of adhesion. R. App. 3. The trial court on remand entered a consent order on July 23, 1998, submitting the case for arbitration before the Honorable Thomas J. Ervin, a retired state circuit court judge chosen by Green Tree. R. App. 75.

On August 19, 1998, the arbitrator held a hearing to consider whether Green Tree's arbitration agreement prevented class arbitration. Following briefing and a hearing, the arbitrator determined that the Agreement did not preclude class arbitration and scheduled a class certification hearing. R. App. 73.

On November 23, 1998, the arbitrator held a hearing on class certification and certified the class. R. App. 71-72. Contrary to petitioner's contentions (Pet. Br. 12), the arbitrator did not "follow the approach that had been imposed

on him by the trial court in *Bazzle*."[4] Rather, he independently "determined that a class action should proceed in arbitration" based on his "careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 84a. The arbitrator "found that the requirements for class certification were met and that class certification was appropriate." *Id.* at 86a. The arbitrator approved a notice of class arbitration to inform unnamed class members of their choice to opt out, and class counsel mailed it to each class member. J.A. 17-23. Ten persons opted out of the *Lackey* class. Pet. App. 91a. The arbitrator also excluded from the class 36 persons whose transactions were closed outside of South Carolina, and 73 persons whose contracts with Green Tree did not include the arbitration clause. Pet. App. 90a-91a.[5]

The *Lackey* class was initially defined broadly to include both manufactured-housing and home-improvement real-estate-secured transactions. Once both the *Bazzle* and *Lackey* cases were in arbitration, however, Green Tree requested that the home-improvement borrowers in the *Lackey* class be bifurcated from the *Lackey* arbitration and consolidated into the *Bazzle* class. The arbitrator granted that request, R. App.

---

[4] The *Bazzle* case was filed and class certification order entered while Green Tree's appeal of the unconscionability decision in *Lackey* was pending. At the time of the *Lackey* class certification hearing, the *Bazzle* case had not yet been assigned to the arbitrator and the *Bazzle* class certification order was under challenge in a petition Green Tree filed in the South Carolina Supreme Court.

[5] The purchasers excluded from the arbitration classes because they were not bound by arbitration clauses brought a class action in court. *Green Tree Fin. Corp. v. Flemmings*, C/A No: 96-CP-40-4282, Richland County Court of Common Pleas. The parties in *Flemmings* stipulated to the record developed in the *Bazzle* and *Lackey* arbitrations. The court granted summary judgment on liability and awarded damages of $7500 per transaction. The court further found that Green Tree's conduct was unconscionable, requiring that Green Tree forfeit all remaining interest. Green Tree did not appeal.

58-59, and the cases thereafter were delineated by type of transaction. The arbitrator maintained the separation between *Bazzle* and *Lackey* because Green Tree operated distinct home-improvement and manufactured-housing divisions, and the facts regarding each division's efforts, if any, to comply with the Preference Statute potentially raised distinct factual questions as to each class.

The arbitrator held a trial on the merits on March 6-8, 2000, R. App. 643-994 (trial transcript), and held Green Tree liable, finding that "Green Tree's behavior in this matter was wilful, wanton and egregious," Pet. App. 108a. In his final order and award, the arbitrator stated that Green Tree "failed to provide any evidence or testimony of compliance" with the Preference Statute, and failed to dispute that "a large number" of its contracts during the relevant time period were completed in violation of that law. *Id.* at 67a & n.4. The arbitrator awarded $5,000 per transaction to each of the *Lackey* class members.

After the arbitrator issued his final order, Green Tree moved the state court to vacate and remand that order based in part on assertions that the Agreement barred class arbitration. The court denied the motion, and granted plaintiffs' motion to confirm the award. Pet. App. 36a-54a. The court observed that:

> the contract itself states that all disputes, claims or controversies relating to the contract or the validity of the arbitration clause or the entire contract shall be resolved by binding arbitration by the arbitrator. Here, Green Tree drafted its own arbitration clause making clear that the parties agreed to arbitrate arbitrability and the decision by the Arbitrator to arbitrate this matter as a class is binding on Green Tree.

Pet. App. 51a. The court rejected Green Tree's argument that the clause's reference to "this contract" foreclosed class-wide

arbitration: "Th[e] 'all powers' language provided by the clause is in addition to the contract rights and remedies and includes the right to determine class arbitration." Pet. App. 49a.

Green Tree appealed, and the state supreme court accepted jurisdiction, consolidating the appeal with a parallel appeal in *Bazzle*. Pet. App. 2a.

b. ***Bazzle v. Green Tree.*** In March 1997, Lynn and Burt Bazzle filed suit against Green Tree for violating the Preference Statute in home-improvement transactions secured by real estate. Pet. App. 56a. The plaintiffs moved for class certification and Green Tree moved to compel arbitration. In late 1997, following local practice of ruling on motions in the order in which they are filed, the South Carolina trial court heard argument on and granted the Bazzles' motion for class certification, R. App. 1350-1358, and then heard argument on and granted Green Tree's motion to compel arbitration, R. App. 1359-1363. The judge also ordered that all foreclosure proceedings against plaintiff class members be stayed pending arbitration. R. App. 1363. Green Tree made no argument that the trial court lacked power to certify a class pending arbitration. R. App. 1448-1449.

In support of class certification, the court concluded that "clearly all the prerequisites of [South Carolina] Rule [of Civil Procedure] 23 have been met." Numerosity was readily met because "Green Tree admits that neither it nor its dealers have advised consumers that they had a right to select a closing attorney or insurance agent," and Green Tree engaged in "at least 3,600 similar type transactions." The legal and factual questions at stake were common, "apply[ing] to all class members," and the named plaintiffs' claims were typical of those of the class because "the named plaintiffs, as well as all the members of the putative class, have identical claims against the defendants." The adequacy of representation by

the named plaintiffs, who had "no potential for conflicting interest" with class members, and by their counsel, who had "experience and past success in matters strikingly similar to the instant case," was also clear and not disputed. Finally, the court found that the South Carolina Rule 23 $100 amount-in-controversy requirement was met. The court ordered plaintiffs to "provide actual notice to the class members in accordance with Rule 23 of the South Carolina Rules of Civil Procedure," and to provide class members the opportunity to opt out of the class. R. App. 1352-1357, 1348. Twelve members elected to opt out of the *Bazzle* class. Pet. App. 68a.

In January 1998, Green Tree urged the trial court to reconsider its order certifying the class, arguing that 'class arbitration of the plaintiff's claims is not authorized under the existing agreement of the parties and the law interpreting the Federal Arbitration Act." R. App. 1451. The court denied the motion, noting that the cases that Green Tree cited "imply that class arbitration is possible given the right set of circumstances." The court also found that Green Tree's arbitration clause "is so broad that one can easily infer that both parties intended to include class arbitration." R. App. 1347.[6]

On May, 12, 1999, Green Tree moved the trial court to dismiss or in the alternative to decertify the class in whole or in part, R. App. 1455, but the court denied the motion for want of jurisdiction over a matter pending in arbitration, Pet. App. 29a. Two and a half years after the court granted Green Tree's motion to compel arbitration, the *Bazzle* case was sent to arbitration. Although Judge Ervin had by then certified a class in *Lackey*, Green Tree chose him to arbitrate *Bazzle* as well.

---

[6] Both the South Carolina Court of Appeals and Supreme Court denied Green Tree's attempts to obtain interlocutory appellate review. Pet. App. 57a-58a; *see* R. App. 1306.

Green Tree then moved the arbitrator to dismiss the action or, in the alternative, to decertify the class, placing the *Bazzle* class certification issue squarely before the arbitrator. Pet. App. 29; R. App. 1455, 3533-3543. On March 23, 2000, the arbitrator denied Green Tree's motion to dismiss and request for decertification, but granted its request that the class claims be narrowed to include only the Preference-Statute and unconscionability claims. R. App. 1400-1404. As his action makes clear, the arbitrator plainly understood that he had independent authority to decide whether and how to proceed with class arbitration, notwithstanding the trial court's order granting certification before sending the matter to arbitration.

After conducting a hearing on May 31, 2000, R. App. 1819-2023 (trial transcript) the arbitrator issued his written award. Pet App. 55a-81a. The arbitrator held Green Tree liable for violating the Preference Statute and awarded relief on a class-wide basis. He found that Green Tree submitted no evidence of compliance or attempted compliance with the Preference Statute enacted years earlier. "Despite Green Tree's vast financial resources, it took no affirmative action to educate itself on the requirements of the South Carolina attorney preference statute." *Id.* at 69a. The arbitrator concluded that the evidence clearly showed an ongoing pattern and practice that began as a careless or negligent attitude and graduated into a willful non-compliance and disregard for South Carolina law:

> Green Tree offered no evidence of any nature that after it was sued by [other consumers] in 1994 that it attempted to comply with the preference statute . . . .
>
> . . . After five suits, including [the *Bazzle* suit], having been brought against Green Tree for failing to comply with the preference statute, it still continued to refuse to take any action or to adhere to the statute's requirements. . . . Thus, based on the testimony and the evidence of record, I find that Green Tree simply chose

> to totally ignore the law despite learning of the requirement. As a result of its behavior, Green Tree's conduct rises to a shocking level of callous and reckless indifference to the rights of South Carolina residents.

Id. at 67a-68a, 69a.

Based on these determinations, the arbitrator awarded a $5,000 penalty to aggrieved consumers in 1,323 home-improvement transactions that occurred prior to the time Green Tree had actual notice of its non-compliance. For the remaining 576 home-improvement transactions that occurred after Green Tree had actual notice of the unlawfulness of its own practices and still did nothing to comply, the arbitrator awarded $7,500 per transaction. Pet. App. 71a, 80a. The arbitrator also awarded reasonable costs and attorneys' fees. *Id.* at 80a-81a.[7]

In accordance with applicable state law, the Bazzles filed a motion to confirm the award in South Carolina trial court, R. App. 1457, and Green Tree filed a motion to remand the award for amendment and clarification, R. App.1538. On September 15, 2000, the state trial court denied Green Tree's motion and confirmed the award of the arbitrator, determining that the arbitrator acted within his authority to hold Green Tree liable on a class-wide basis. Pet. App. 27a-35a. Green Tree appealed, and the South Carolina Supreme Court assumed jurisdiction to hear the appeal in consolidation with the *Lackey* case. Pet. App. 2a.

[7] Petitioner's suggestion (Pet. Br. 13) that class counsel's fee award was excessive is baseless and, since it is a state law question, wholly gratuitous. *See* Pet. App. 71a-79a (Arbitrator's detailed justification for award). Green Tree's own clear and wilful law violations and ensuing litigiousness necessitated substantial work by class counsel, despite the fact that Green Tree lacked any colorable defense on the merits.

c. ***The South Carolina Supreme Court decision.*** The state high court unanimously affirmed. Stressing that South Carolina law "favors arbitration of disputes," and that the state courts accordingly "resolve any doubts concerning the scope of arbitrable issues in favor of arbitration," Pet. App. 17a, the court applied state contract law to hold that Green Tree's contract language "does not limit the arbitration to non-class arbitration." Pet. App. 19a.

The court emphasized that its decision rested on "independent state grounds": "[U]nder general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them." *Id.* at 20a-21a. The Court found the contract language ambiguous "[a]t best," Pet. App. 19a, noting that the requirement that ambiguous language be construed against the drafter not only was well settled in South Carolina, Pet. App. 17a *(citing Myrtle Beach Lumber Co., Inc. v. Willoughby*, 274 S.E.2d 423 (S.C.1981)), but also comports with this Court's FAA jurisprudence, Pet. App. 18a (*citing Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 53 (1995)). The court specifically rejected Green Tree's argument that the arbitration clause's reference to disputes relating to "this contract" precludes class arbitration. Pet. App. 19a.

The court also emphasized that "no case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." Pet. App. 21a (*citing Episcopal Housing Corp. v. Federal. Ins. Co.*, 255 S.E.2d 451 (S.C. 1979); *Plaza Development. Services. v. Joe Harden Builder, Inc.*, 365 S.E.2d 231 (S.C. Ct. App. 1988)). The court pointed to South Carolina precedent allowing consolidated arbitration and recognized that some jurisdictions foreclosed class arbitra-

tion based on their own state rules against consolidated arbitration. Pet. App. 21a.

The court described its decision to reject implied waiver of class arbitration as serving important state interests that are directly implicated in this case. "If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." Pet. App. 22a. Such a result would thwart South Carolina's interest in vindicating its consumer protection laws. Indeed, under petitioner's approach, "parties with nominal individual claims, but with significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." Pet. App. 22a.

The state supreme court also analyzed whether, notwithstanding state law permitting class arbitrations, federal law compelled the opposite result. The court observed that some federal courts had followed *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), to deny class arbitration in cases brought in federal court under FAA § 4. The court reasoned that it was not obliged to follow *Champ* because that case articulated an exclusively "federal approach" based on an application of § 4, which by its plain terms governs only a petition to a "*United States district court.*" Pet. App. 12a n.11, 20a. The court noted that the judgment sustaining the arbitration award had particular force given the limited scope of judicial review of arbitration decisions under both federal and South Carolina law. Pet. App. 23a (*citing Major League Baseball Players' Ass'n v. Garvey*, 532 U.S. 504 (2001) (per curiam); *Pittman Mortgage Co. v. Edwards*, 488 S.E.2d 335, 337-38 (S.C. 1997) (interpreting S.C. CODE ANN. § 15-48-130, the state-law analogue to FAA § 10)). To overturn an arbitrator's decision, as Green Tree itself acknowledged, it must show that "the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case." Pet. App. 24a (citing Green Tree brief and state case) (emphasis in opinion). Because "the arbitrator did not act in manifest disregard of the law by permitting [the class arbitration] to proceed," the court upheld the arbitrator's awards in both the *Bazzle* and *Lackey* cases. *Id.*

Green Tree and its *amici* also asserted that the due process rights of absent class members were violated by the class-wide arbitration, but the court held that Green Tree had failed to preserve that claim, and that, in any event, there was "no evidence that the rights of the absent class members were not protected in this case." Pet. App. 25a. Acknowledging that "protection of the due process rights of absent class members is an essential component of all class actions, and one which may necessitate particular attention in class-wide arbitrations," the court observed that the class members' rights in this case "appear to have been properly protected by the notice given to all of them," and the corresponding right to opt out. *Id.* at 26a.[8]

SUMMARY OF ARGUMENT

The South Carolina Supreme Court applied ordinary state contract doctrine to hold that the arbitration clause "does not limit the arbitration to non-class arbitration," Pet. App. 19a,

[8] In December 2002, petitioner filed for relief under the United States Bankruptcy Code. Substantially all of petitioner's assets are being sold and petitioner is being liquidated. The judgment of the South Carolina Supreme Court in this case is secured by bonds, but if that judgment were reversed and these 3,700 consumers remitted to individual arbitrations, they likely would have limited, if any, recourse for petitioner's violation of law.

and thus permits class-wide arbitration in the arbitrator's discretion as authorized by South Carolina law, *id.* at 21a-22a. The parties' agreement did not specify the procedures to be used in arbitration under it, but did specify that South Carolina law would govern. Under South Carolina law, class arbitration is permissible in appropriate circumstances where the parties' agreement does not foreclose it.

Petitioner urges reversal, as a matter of federal law, on the ground that the state high court misread the parties' contract. Arguing that the FAA mandates enforcement of arbitration agreements "in accordance with their written terms," petitioner attempts to spin a preemptive federal rule of arbitration-contract interpretation from snippets of language taken out of context from this Court's cases. Under petitioner's proposed rule, any party displeased with a state court's interpretation of an arbitration agreement would have a federal claim that the contract was not interpreted "in accordance with its written terms." The FAA effected no such wholesale federalization of matters of state law.

There is no express or field preemption under the FAA. Conflict preemption under the Act is limited to state law that discriminates against or disfavors arbitration as such, and the decision here did neither. This Court's references to the enforcement of arbitration agreements "according to their terms" are simply directives to ensure that courts repudiate historical practices of voiding arbitration agreements due to a bias in favor of adjudication, and instead interpret those agreements neutrally under ordinary principles of state law. That language was not meant to displace routine state-law contract interpretation with federal law.

To the contrary, it is well settled that "the interpretation of private contracts is ordinarily a question of state law" under the FAA. *Volt Info. Sciences Inc. v. Bd. of Trustees*, 489 U.S. 468, 474 (1989). The state supreme court faithfully

interpreted the Agreement in accordance with generally applicable principles of state law to permit the arbitrator to conduct a class arbitration. The contract contains no prohibition on class arbitrations, grants the arbitrator all powers under the law including equitable powers, and authorizes arbitration of all disputes arising from or related to the contract or the parties' relationship. Because the South Carolina Court's routine application of ordinary state contract law principles to this agreement neither discriminated against nor disfavored arbitration, there is no ground for federal preemption here.

Nor is there any warrant in the FAA to fashion a special federal background rule that would prohibit class arbitration unless the parties' agreement explicitly authorized it. The Court in *Volt* recognized that the FAA leaves room for states to fashion their own procedures to facilitate multiparty arbitration. Class arbitration meshes even more comfortably with the FAA than the rule in *Volt* providing for stays of arbitration pending related litigation. It would distort the FAA beyond recognition to find in it presumptive mistrust of arbitrators' abilities to handle potentially complex procedures like class arbitration. As petitioner itself acknowledges, the FAA does not establish any inherent clash between arbitration and class actions. Pet. Br. 32 ("No one can doubt that the parties to an arbitration could agree to proceed in such a fashion."), *id.* at 42. The FAA's complete silence on class arbitration, together with the compatibility of class treatment and arbitration as a practical matter, shows the FAA's lack of any preemptive effect here.

Petitioner does not argue that the arbitrator misapplied class action standards. Here, each and every one of the numerous class members was governed by the same agreement to arbitrate, their identical underlying claims all were subject to arbitration, the case unquestionably met the State's standards for class certification, and only those persons who

did not opt out of the class proceeding before the arbitrator were included. This case was an ideal candidate for class arbitration, and the arbitrator successfully conducted a class arbitration. Nor is petitioner claiming that the arbitrator erred in finding it liable with respect to anyone in the respondent class. The illegality of Green Tree's challenged conduct has long been clear.

Petitioner's objective here is instead to find a way to avoid having to pay each person whose rights it admittedly violated. Despite earlier awards against it in individual cases raising the same claim, Green Tree persisted for years in violating the Consumer Code in thousands of additional transactions in South Carolina. Now that it has been held liable to a class, it argues that the FAA forecloses class arbitration, and that the agreement to arbitrate silently waived the right to sue on a class-wide basis. The FAA has no such effect. It does not displace state law that permits class arbitration. Class arbitration here, under a contract that did not purport to foreclose it, served the State's interest in effective and efficient enforcement of is laws, and did so in a manner fully consistent with the FAA.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION TO PERMIT ARBITRATION OF CLASS CLAIMS FULLY COMPORTS WITH THE FAA

A. Under the FAA, State Law and Arbitrator Discretion Supply Rules of Arbitration Procedure Not Specified in an Agreement to Arbitrate

The decision of the South Carolina Supreme Court fully accords with the parties' Agreement and the text and purposes of the FAA. As that court held, the parties' Agreement

places no limits on an arbitrator's ability to conduct class arbitration. *See* Pet. App. 19a; *see also* Point II, *infra*. The only matter of arbitration procedure directly addressed by the agreement in this case is the unavailability of a jury. Pet. App. 110a. Such lack of any other specification leaves matters of arbitration procedure to the arbitrator's discretion, within the parameters set by state law and the FAA. The arbitrator was thus free to proceed on a class-wide basis in a fitting case, and he appropriately elected to do so here.

The FAA says nothing about the procedures to arbitrate state-law claims. Section 7 of the FAA—which gives arbitrators power, backed by the federal courts, to summon witnesses to arbitration—is the only provision of the Act that addresses arbitration procedures, and even that provision is directed exclusively to federal cases. 9 U.S.C. § 7 (referring to "United States district court" and "courts of the United States").[9] The FAA does not speak to whether an arbitrator may permit plaintiffs to proceed on a class basis, for "there is no federal law favoring arbitration under a certain set of procedural rules." *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 476 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 11 n.6 (1984) ("The procedures to be used in an arbitration are not prescribed by the [FAA]").

Selection of arbitration procedures not specified by an arbitration agreement or mandated by state law rests within the arbitrator's discretion. "[P]rocedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S.Ct. 588, 592 (2002) (*quoting John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

---

[9] State law provides the analogous procedure for state arbitrations. S. CAR. CODE ANN. § 15-48-10 (providing subpoena power to state arbitrators).

Even if there were some doubt that the agreement in this case left to the arbitrator the choice of arbitration procedures, including class arbitration, his decision to proceed on a class basis must be accorded great deference. It is well settled that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001) ("unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration [of the disputed question] should be ordered"). Thus, in deciding whether the parties' agreement authorized the arbitrator to certify a class, this Court should resolve any doubts about the matter in favor of the arbitrator's decision. Matters within an arbitrator's power, such as the procedures for conducting the arbitration, are ordinarily subject to only the most limited and deferential judicial review. *Major League Baseball Players' Assoc. v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (judicial review of arbitration decision is "very limited," warranted only when the arbitrator "strays from interpretation and application of the agreement and effectively 'dispenses his own brand of . . . justice'"); *Pittman Mortgage Co. v. Edwards*, 488 S.E.2d 423, 337-38 (S.C. 1997) (arbitral awards subject to narrow review under S.C. CODE ANN. § 15-48-130(a)).

B. FAA § 2 Preemption Is Limited to Ensuring that State Law Does Not Disfavor Arbitration

FAA preemption is narrow. "The FAA contains no express preemption provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc., v. Bd. of Trustees*, 489 U.S. 468, 477 (1989). Thus, petitioner must depend on conflict preemption, which requires a showing that the state rule would "actually conflict

with federal law" by "standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *id.* at 477 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The guiding rule is that preemption is disfavored, *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990), especially where the federal law with which the state decision assertedly conflicts is completely silent on the matter, *see Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), as the FAA is on class arbitration.

There is no FAA preemption here. The principal preemptive thrust of the FAA is to displace state laws that would frustrate the parties' choice to arbitrate rather than litigate. To that end, FAA § 2 states that

> an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Congress thereby "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. at 10; *see Green Tree Financial Corp. of Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (emphasizing purpose of FAA "to reverse the longstanding judicial hostility to arbitration agreements"). This Court has held that the FAA applies to state-law disputes such as this one in a very limited fashion, for the specific purpose of overriding state-law favoritism toward judicial rather than arbitral resolution.

This Court has identified only two categories of state law that are subject to conflict preemption under Section 2, neither of which is applicable here: *First*, the FAA displaces state-law principles that *target* arbitration agreements for

special or different treatment from other contracts, on the ground that such arbitration-specific law "would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress's intent." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (*quoting Allied-Bruce Terminix Cos., Inc., v. Dobson*, 513 U.S. 265, 281 (1995)). "Congress precluded states from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687. The Court in *Casarotto* accordingly held that FAA § 2 preempts Montana law that imposed special notice requirements only on contracts "subject to arbitration." *Id.* at 683. In *Allied-Bruce*, the Court applied the anti-targeting principle to hold that FAA § 2 preempts Alabama law categorically invalidating written, pre-dispute arbitration agreements. *Allied-Bruce*, 513 U.S. 265. *Second*, the FAA preempts state law that would *exempt* certain categories of cases from arbitration, because such state law evinces the very mistrust of arbitration that the FAA serves to counteract. *See Perry v. Thomas*, 482 U.S. 483 (1987) (FAA § 2 preempts California law exempting wage claims from arbitration); *Southland Corp*, 465 U.S. 1 (FAA § 2 preempts provision of California Franchise Investment Law that state courts had interpreted to exempt from arbitration claims arising under that law).

Neither of those categories of preemption ousts South Carolina law permitting class arbitration under contracts that allow for it. Aggregation of like claims subject to the same arbitration agreement does not "place arbitration clauses on an unequal 'footing'" with other contracts in violation of the *Casarotto* anti-discrimination principle. Given that claims relating to the same contract could be pursued in court on a class-wide basis, the mere presence of an arbitration clause should not, under *Casarotto*, make class proceedings

unavailable.[10] Nor does the state court's decision evince the mistrust of or hostility toward arbitration condemned in *Perry*. To the contrary, allowing arbitrators to manage important cases with procedural sophistication shows equal respect for, rather than skepticism of, the arbitral forum.[11]

---

[10] Indeed, the very claim at issue in this case proceeded to judgment in a class action in state court brought by those purchasers whose contracts with Green Tree did not contain arbitration clauses, and whom the arbitrator therefore excluded from the arbitration classes. *See Flemmings v. Green Tree Fin. Corp.*, note 5, *supra*, at 9.

[11] Petitioner and its *amici* intimate that permitting class arbitration is somehow anti-arbitration because it raises the prospect that some arbitrations could come to resemble litigation, to the point where certain parties might no longer find arbitration so attractive. Pet. Br. 39-41; *e.g.* Brief of Washington Legal Foundation as *Amicus Curiae*, at 13 ("The real danger here is that by imposing class-based arbitration procedures in the face of a silent arbitration clause, the South Carolina courts are discouraging parties from agreeing to arbitration in future cases."); Brief for American Bankers' Assn. *et al.*, as *Amici Curiae*, at 18. Although arbitration, even on a class basis, may often be simpler and faster than a trial, the FAA simply does not promise any particular level of simplicity or relative economy; "potential complexity should not suffice to ward off arbitration." *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); *see Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987) (rejecting arguments that Securities and RICO claims are non-arbitrable due to their complexity). This Court's endorsement in *Mitsubishi Motors* of arbitration of antitrust violations, which "can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage," 473 U.S. 614, 655 (Stevens, J, dissenting), belies any assertion that complex matters cannot be arbitrated. The same "adaptability and access to expertise," *id.* at 633-634, that make antitrust, securities and RICO claims not inherently unsuited to arbitration support confidence in arbitrators' ability to conduct class proceedings. *See generally* American Arbitration Association website, http://www.adr.org/index2.1.jsp?JSPssid=15739 ("Over the last several decades, the American Arbitration Association has administered over 100,000 mass claims cases for a wide range of class action and mass claims involving insurance, bankruptcy and discrimination matters.")

II. THE FAA DOES NOT ESTABLISH A FEDERAL COMMON LAW OF CONTRACT INTERPRETATION UNDER WHICH THE ARBITRATION AGREEMENT'S REFERENCE TO "THIS CONTRACT" WOULD FORECLOSE CLASS ARBITRATION

Petitioner does not challenge the South Carolina Supreme Court's reading of the Agreement, under South Carolina law, as allowing class arbitration—indeed, this Court has no authority to review that determination of state law. Nor does petitioner maintain that the FAA expressly or implicitly precludes all class arbitration. To the contrary, it expressly concedes that parties may choose to proceed on a class-wide basis in arbitrations governed by the FAA. Pet. Br. 32, 42.

Petitioner is thus reduced to arguing that an asserted FAA requirement that contracts to arbitrate be "enforced according to their written terms" establishes a body of *federal* contract law for interpretation of arbitration agreements that would authorize federal courts to second-guess state law. But there is nothing in the FAA to suggest that Congress authorized the federal courts to create a common law of arbitration contracts. Because it cannot point to any general FAA prohibition of class actions, petitioner is left with the case-specific contention that the contract language in this case precludes class arbitration.

If this Court were to accept petitioner's position, it would invite any party unhappy with the results of a state court's or an arbitrator's interpretation of an arbitration agreement to seek review of routine questions of contract interpretation in federal court by casting its complaint as one of misinterpretation—or in petitioner's terms, "rewriting"—of the contract rather than enforcement "according to its written terms." The FAA establishes no such federal rule, but trusts the state courts neutrally to apply their own contract law to determine the meaning of arbitration clauses. *Cf. American*

Airlines v. Wolens, 513 U.S. 219, 232 (1995) (finding nonpreemption where it was implausible that Congress intended to channel into federal court large body of routine common-law contract claims).

The arbitrator and the state courts here faithfully applied well-established South Carolina law of contract interpretation, pursuant to a contract that expressly called for the application of South Carolina law. Neither the arbitrator, nor any of the numerous judges that Green Tree entreated to halt the class arbitration in this case, agreed with Green Tree's interpretation of the Agreement.[12] The FAA reserves interpretation of state arbitration agreements to the state courts, and the South Carolina Supreme Court's judgment accords with the FAA and is not subject to second-guessing by this Court.

A. Under the FAA, General Principles of State Law Govern Questions of Interpretation of Arbitration Agreements

Petitioner pins its case on assertions that the Agreement must be read according to its written terms, *see e.g.* Pet. Br. at 18-22, and that those terms "foreclose" class arbitration. Pet. Br. 42; *see also id.* at 17 ('the parties' intent is expressly to the contrary" of the state rule permitting class arbitration); *id.* at 37 (asserting that "express limitations" of the contract

---

[12] The state courts, as well as the arbitrator, time and again rejected Green Tree's interpretation of the Agreement as foreclosing class arbitration. *See, e.g.*, Pet. App. 19a (unanimous opinion of South Carolina Supreme Court); R. App. 1346-1347 (opinion of Dorchester County Circuit Judge Patrick R. Watts in *Bazzle* denying defendant's motion for reconsideration of class certification); R. App. 49a-50a (opinion of Barnwell County Chief Circuit Judge Rodney A. Peeples in *Lackey* denying defendant's motion to vacate arbitral award); R. App. 63-64 (opinion of Barnwell County Circuit Judge Gary E. Clary dismissing Green Tree's collateral action to stay class arbitration).

foreclose class arbitration). Under the FAA, however, the state's high court is the ultimate arbiter of the meaning of the contract terms. The question whether the Agreement in this case permitted the arbitrator to conduct class arbitration is a matter of state law, which the arbitrator and state courts resolved in respondents' favor.

The FAA preserves a substantial role for state law in the interpretation and enforcement of agreements to arbitrate. As this Court has repeatedly made clear, "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce*, 513 U.S. at 281. Notwithstanding the FAA, "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt*, 489 U.S. at 474. *See also Perry*, 482 U.S. at 492 n. 9 (state legislative and judicial law is applicable to arbitration contracts if it deals with "contracts generally" and does not construe arbitration agreements "in a manner different from that in which it otherwise construes nonarbitration agreements under state law"). As *Allied-Bruce*, *Perry*, and *Volt* make clear, the general contract law that applies in a case such as this is state, not federal, law. Indeed, there is no general federal common law of contract interpretation, s*ee O'Melveny & Myers v. FDIC,* 512 U.S. 79, 83 (1994), and the FAA is not a mandate to create one, *cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Green Tree attempts to characterize language from this Court's cases as supporting special federal review to ensure that arbitration agreements are enforced "according to their written terms." That is exactly what the South Carolina Supreme Court did in this case. The Court refers to enforcement of arbitration agreements "in accordance with their terms" simply to mean that arbitration agreements should be interpreted *in the same manner as any other contract*. For example, the Court stated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) that

"commercial arbitration agreements, *like other contracts*, are enforced according to their terms and according to the intentions of the parties." 514 U.S. 938, 947 (1995) (emphasis added). Similarly, in *Volt* the Court explained that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, *like other contracts*, in accordance with their terms." 489 U.S. at 478 (emphasis added). The point of the reference to enforcement of arbitration agreements "in accordance with their terms" is not to impose a layer of routine federal oversight of questions of arbitration agreement interpretation, but simply to place interpretation of those agreements on the same footing as other contracts, that is, precisely to ensure that they are governed by generally applicable principles of state contract law. None of the cases in which this Court has referred to enforcement of arbitration agreements "in accordance with their terms" had anything to do with the supposed tension between class actions and arbitration that petitioner urges, nor, indeed, with any presumption against particular procedures on the ground that they might be ill-suited to arbitration. There is absolutely no evidence that Congress in enacting the FAA sought to federalize routine matters of state court contract interpretation, as petitioner's argument necessarily implies.

Petitioner's argument not only mischaracterizes the precedent, but also fails in its own terms. Where, as here, an agreement does not purport to bar class arbitration, it is difficult to see how class proceedings could have been *other* than "in accordance with the terms" of the Agreement. *Volt* acknowledges the latitude parties enjoy "to choose the terms under which they will arbitrate," 489 U.S. at 472, but there is no requirement that the parties must specifically address in advance all procedural issues that might arise in an arbitration. If this Court's reference to arbitration "in accordance with the terms" of the agreement carried the

restrictive force that petitioner ascribes to those words, arbitrations would grind to a halt. For example, Green Tree's Agreement in this case made no provision for discovery within the arbitration, the order of motions and proof to be submitted to the arbitrator, or other procedural matters that the arbitrator addressed. Under petitioner's approach of exclusive reliance on authority spelled out in the contract, even an individual plaintiff's claim could not have been arbitrated under this Agreement. Because the state court's interpretation of the Agreement did not discriminate against arbitration and was not hostile to arbitration, its resolution of state law is not preempted by the FAA.

B. The State Court Faithfully Applied State Law To Hold That The Agreement Permitted Class Arbitration

Even if the FAA were construed to authorize federal court review of state court contract interpretation, there would be no basis for overturning the decision below. The South Carolina Supreme Court, applying arbitration-neutral rules of contract interpretation, concluded that the Agreement was "at best" ambiguous with respect to class arbitration. Pet. App. 19a. In interpreting the Agreement, the court applied the entirely unexceptional, generally applicable state-law rule that an ambiguity in contract terms "should be construed against the drafter." Pet. App. 19a. That principle is well settled in South Carolina,[13] as well as many other

[13] *See, e.g., Myrtle Beach Lumber Co., Inc. v. Willoughby*, 274 S.E.2d 423, 426 (S.C. 1981) (cited in opinion below, Pet. App. 17a); *Southern Atlantic Fin. Services., Inc., v. Middleton*, 562 S.E.2d 482, 486 (S.C. Ct. App. 2002) ("It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion."); Ralph K. Anderson, Jr., *South Carolina Requests to Charge*—Civil § 19-7, Contract—Rules of Construction (2002) (standard jury instruction stating that "ambiguities must be construed against the party who prepared the contract . . . . Where a contract is entered into upon a form prepared by a party, the language of the contract will be strictly construed against that party.")

jurisdictions.[14] This Court has itself, in reviewing a federal-court FAA case, approved of the precise rule the South Carolina court used here: "the common-law rule of contract interpretation that a court should construe ambiguous language against the interests of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995).

1. The State Court's Decision Is Strongly Supported By State Law and the Terms of the Agreement

The language in Green Tree's Agreement creates an implication in respondents' favor considerably stronger than the one this Court credited in *Mastrobuono*. While the agreement does not use the words "class-wide arbitration" or "class action,"[15] it can be read affirmatively to authorize such a procedure, and certainly provides no more than the most strained support for petitioner's contrary reading.

First, the Agreement's own choice-of-law clause authorized the application of South Carolina law to the arbitration in this case, and South Carolina law permits class actions in arbitration as well as litigation. *See* S.C. R. Civ. P. 23 (authorizing class actions); Pet. App. 21a ("no case law or statute in South Carolina prohibits class-wide arbitration") (*citing Episcopal Housing Corp. v. Federal Ins. Co.*, 255

[14] *See* Restatement (Second) of Contracts § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

[15] *Compare* Green Tree's revised standard form contract containing an express waiver of buyers' rights to bring participate in class actions, *supra* at 3-4.

S.E.2d 451 (S.C.1979) (authorizing consolidated arbitration in appropriate circumstances)). Green Tree's contract expressly states that "this contract will be governed by the law of the State of South Carolina." R. App. 2162. The Agreement fails to specify any other set of procedural rules to govern the arbitration, making state law a natural source to fill that gap. Under South Carolina law, "state procedural rules that do not undermine the enforceability of an otherwise valid contract to arbitrate may be deemed to have been incorporated into a contract through choice of law provisions." *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001). Green Tree's own choice-of-law provision thus incorporates the South Carolina default rule permitting class arbitration.[16]

Second, the Agreement expressly grants to the arbitrator "all powers provided by the law and the contract," which are fairly understood to include the authority to certify a class. The power to certify a class is a power provided by South Carolina law, even if it is not otherwise expressly provided by a contract. *See* R. App. 62-63 (trial court refusing to enjoin class arbitration because contract's "all powers provided by the law" clause authorizes it).

Third, the Agreement gives the arbitrator power over "all disputes" arising under any source of law whatsoever. Just as

[16] *Mastrobuono's* treatment of the New York choice-of-law provision is not to the contrary. There was language in the *Mastrobuono* contract that contradicted application of the choice-of-law clause to the disputed damages question, 514 U.S. 58-59, and such contradictory language is lacking here. Moreover, as the Court noted in *Mastrobuono*, it was reviewing "a federal court's interpretation of [a] contract," which was not entitled to any special deference. The precedent more relevant to a state case like this one is *Volt*, in which the contractual choice of state law supported application of state multiparty arbitration rules. This case, like *Volt*, 489 U.S. 486, is governed by the rule of "defer[ence] to the [state] court's construction of its own State's law." *Mastrobuono*, 514 U.S. at 60 n. 4 (distinguishing *Volt* on that ground).

the reference to "any controversy" in the agreement at issue in *Mastrobuono* supported the arbitrator's authority to award punitive damages, so, too, the broad reference to "all disputes" in the Green Tree agreement permits the arbitrator to decide whether the arbitration should proceed on a class-wide basis. *See also Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 774, (7th Cir. 2000) (Posner, J.) (applying "usual methods of contract interpretation" to hold that agreement to arbitrate "any dispute arising out of the interpretation, performance or breach of this Agreement "authorized consolidation of arbitration because "the word 'dispute' . . . does not exclude a dispute involving multiple parties").

Fourth, the Agreement specifies that the arbitrator's authority is not limited to simple contract remedies, but includes "equitable" powers. That reference can reasonably be read to encompass authority to certify a class. "[T]he class action was *an invention of equity* to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808 (1985) (emphasis added); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-837 (1999); *Dickler v. Shearson Lehman Hutton Inc.*, 596 A.2d 860 (Pa. 1991) (holding that authority to conduct class arbitration is an equitable power of the arbitrator).

Fifth, the contract's express waiver of the right to a jury implies that other questions of arbitration procedure were left to background principles of law and the arbitrator's discretion. South Carolina courts recognize as a general matter of contract interpretation that "*expressio unius est exclusio alterius*," *i.e.*, the expression of one thing implies the exclusion of another. *Evins v. Richland County Historic Preservation Comm'n*, 532 S.E.2d 876 (S.C. 2000). That principle suggests that the Agreement, which expressly required buyers

to waive their jury trial rights, did not effect a waiver of any other specific procedures.

Petitioner's principal argument is that the Agreement's reference to disputes arising from or relating to "this contract" precludes class arbitration. But the clause in which that phrase appears refers to the underlying substantive claims and defenses that must be arbitrated, and not to the procedures that the arbitrator should use in conducting the arbitration. It states:

> All disputes, claims or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration . . . .

Pet. App. 110a. That clause does not address multiparty issues at all, but only makes clear that the agreement to arbitrate encompasses not only contract claims as such, but related tort or statutory claims, as well as gateway issues such as the validity of the Agreement. As Petitioner itself characterizes it, that clause "identifies the matters that will be subject to arbitration." Pet. Br. 8. There is no question that the underlying claims of all the class members "relate[d]" to the identical contracts they entered with Green Tree. Given that the law in South Carolina does not prevent an individual party to a bilateral contract to act as a class representative in order to pursue claims relating to that contract in a class action, there is no reason to think that the arbitrator would lack the power to authorize a plaintiff to play a similar representative role in an appropriate case pending in arbitration. If the Agreement contained the same sentence, but with the word "litigation" in place of "binding arbitration," nobody would contend that the terms operated *sub silentio* to foreclose class actions.

Even assuming the reference to "this contract" could somehow be read to be relevant to procedures rather than to the

substantive matters to be arbitrated, it would not foreclose class arbitration. It provides for arbitration, not just of claims "arising from" the contract, but of any "disputes . . . relating to this contract or the relationships which result from this contract." The dispute over whether class arbitration is permissible "relates to" the contract and the relationships that derive therefrom. It is a dispute about whether the named plaintiffs may, in the context of their suit against the defendant, play a role as representatives of other persons similarly situated with respect to the defendant. The dispute also "relates to" the substantive "claims" because it turns on the typicality and commonality of the named plaintiffs' claims vis-a-vis those of the unnamed class members. The sentence is devoid of limiting language that would support the notion that the arbitrator could consider only procedural issues relating *exclusively* to the two parties and not to identical claims presented by similarly situated others under the same contract language.

Green Tree's reliance on the clause referring to "arbitration by one arbitrator selected by us with consent of you" fares no better. That clause sets forth the parties' respective roles in the selection of an arbitrator. It plainly was not designed to limit the scope of any arbitral dispute to one that is necessarily "bilateral." Pet. Br. 39. Nor does the clause guarantee Green Tree the right "to select, in the first instance, the individual who would have authority to resolve the disputes arising from or relating to each specific contract." *Id.* at 43.

Indeed, that argument is wholly circular: If the Agreement is otherwise consistent with class arbitration, as we have argued and the state high court held, then Green Tree's selection of an arbitrator for any given plaintiff's claim was subject to the possibility that the case might go forward under that arbitrator on a class-wide basis. That argument is also particularly weak in this case because plaintiffs filed class

complaints in both *Bazzle* and *Lackey*, putting Green Tree on actual notice in both cases that its selection of an arbitrator for each case would (unless one of its other anti-class-arbitration arguments prevailed) amount to selection for purposes of the class action.[17]

Green Tree's contention that the Agreement precludes class arbitration is utterly implausible. As we have shown, the Agreement's terms, viewed evenhandedly under South Carolina contract law, squarely refute Green Tree's objection that class arbitration is contractually "foreclosed." Pet. Br. 42. The Agreement does not specifically mention class proceedings, just as the contract in *Mastrobuono* did not mention "punitive damages," but the Agreement here, as there, "strongly implies" the disputed coverage. 514 U.S. at 60. Green Tree is responsible for any ambiguity in its Agreement, and thus "cannot now claim the benefit of the doubt." *Mastrobuono*, 514 U.S. at 63.

2. *There is No Basis for Petitioner's Contention That The State Court "Rewrote" The Parties' Agreement in Order To Serve its Own Policy Preferences*

Only in the most exceptional cases, in which a state court has somehow distorted its law in a manner that discriminates against or is hostile to arbitration rights, are questions of state law subject to preemption under the FAA. See Point I. B., *supra*. Petitioner can show no such discrimination or hos-

[17] The unnamed class members' right under the Agreement to withhold their consent to Green Tree's selected arbitrator was preserved by the right to opt out of the plaintiff classes—a right which several class members elected to exercise. Moreover, in the context of a class action, the reference to "you" may be read as plural. *See Conn. Gen. Life Ins. Co.*, 210 F.3d at 775 (Posner, J.) (reading reference to "each party" in context of arbitrator selection provision to refer to each "side" in the dispute).

tility, and accordingly resorts to inflated rhetoric, asserting repeatedly that the state court "modified," "rewrote," "reformed," "distorted" or "attempted to improve upon" the written terms of the parties' contract, "disregarding" or "ignoring" Green Tree's chosen language in order to "impose," "intrude" or "superimpose" on it the court's own policy preferences. *See, e.g.*, Pet. Br. 3, 4, 5, 15, 18, 22, 23, 24, 25, 28, 30, 31, 32. Shorn of the rhetoric, however, petitioner's argument amounts to nothing more than a quibble with the arbitrator's and the state court's uniform interpretation of the contract. All of Green Tree's expressions of outrage do not change the fact that, even if the state court erred in applying its own law, which it plainly did not, there is no federal issue in this case.

For example, petitioner decries what it characterizes as the State "impos[ing] on the parties its own notions of 'efficiency and equity.'" Pet. Br. 32; *id.* at 3. The court did no such thing. Rather, as explained above, the court applied ordinary, arbitration-neutral principles of contract interpretation and found that the Agreement was at best ambiguous regarding class arbitration and that, under state law, class arbitration procedures were therefore available in appropriate cases. Petitioner wholly miscasts the role of the "efficiency and equity" inquiry to which the state court referred. Far from signaling any free-ranging power to rewrite contracts to suit the court's own notions of fairness, the terms refer to considerations relevant to an arbitrator's decision whether to certify a class where class procedures are an available option under the contract.

III. THE FAA DOES NOT CREATE A FEDERAL PRESUMPTION AGAINST CLASS ARBITRATION THAT WOULD FORECLOSE CLASS ARBITRATION HERE

Where, as here, an agreement to arbitrate does not expressly provide for or prohibit class arbitration, the South

Carolina background rule permits it. Although another state might apply ă different default rule,[18] there is no preemptive FAA background rule against class arbitration that foreclosed South Carolina state law from permitting it here. Indeed, petitioner's concession (Pet. Br. 32) that parties are free to agree to class-wide arbitration without running afoul of the FAA makes any suggestion of an inherent conflict untenable.

A. The FAA Does Not Preempt State Court Procedures For Multiparty Arbitration

Conflict preemption requires a showing that state law actually conflicts with federal law. Yet the FAA is wholly agnostic as to class arbitration. Petitioner consequently cannot point to any actual conflict here.

This Court in *Volt* recognized that state procedures for multiparty arbitration are compatible with the FAA. The Court ruled that the FAA did not preempt a state-law procedural rule that authorized arbitration of state-law claims to be stayed pending litigation of related claims among parties not subject to arbitration. 489 U.S. 468. As the Court noted, "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include contracts to arbitrate." *Id.* at 476 n. 5. California

[18] *Compare Med Center Cars, Inc. v. Smith*, 727 So.2d 9, 19-20 (Ala. 1998) (denying class arbitration where agreement did not specifically provide for it) *with Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. 1991) (allowing class arbitration as within arbitrator's equitable powers); *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom Southland Corp. v. Keating*, 465 U.S. 1 (allowing class arbitration where agreement does not foreclose it); *Blue Cross of California v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998) (finding state rule permitting class arbitration not preempted by FAA); *Boynton v. Carswell*, 233 S.E. 2d 185 (Ga. 1977) (allowing class arbitration in challenges to local taxes), *overruled on other grounds by Callaway v. Carswell*, 242 S.E.2d 103 (Ga. 1978).

"ha[d] taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments." *Id.* Application of the California rule was arguably hostile to arbitration because it allowed the state court to stay arbitration pending the resolution of related litigation, the result of which might then control the arbitration. The Court in *Volt* nonetheless found no actual conflict with the FAA's "healthy regard for the federal policy favoring arbitration," *id.* at 475, and thus no preemption.

Under *Volt,* South Carolina's approval here of class arbitration is *a fortiori* not preempted by the FAA. Like the agreement in *Volt*, Green Tree's Agreement included a clause specifying that state law would govern. R. App. 2162. South Carolina, like California in *Volt*, has expressed its own state policy with respect to a question of multiparty arbitration. Here, the state has chosen not to foreclose a class proceeding where an agreement allows it and the arbitrator has elected to permit it. Because it facilitates arbitration, South Carolina's rule is even more compatible with the FAA than the California rule at issue in *Volt*.

The arbitrator did in fact conduct class arbitration here, and South Carolina's allowance of it eased rather than obstructed arbitration of the parties' disputes. Respondents here do not assert an entitlement to bring a class action that would divert the case from arbitration into court. Unlike the plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), they do not rely on class-action rights as a ground for relief from an agreement to arbitrate. *Id.* at 32 (rejecting contention that potential unavailability of class arbitration of ADEA claim renders it unfit for arbitration). Rather, respondents joined together as a class in order more efficiently to resolve their claims within arbitration. Nothing in this Court's FAA preemption jurisprudence suggests that application to arbitra-

tion agreements of arbitration-neutral state law which facilitates arbitration is at odds with the FAA.[19]

Petitioner identifies only one lower-court case, *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), to support its contention that the FAA mandates a presumption against class arbitration. *Champ* does not apply here, however, because it rests on FAA § 4, which is inapplicable in state court. By their own terms, each of the FAA procedural provisions that addresses trial-court procedures at the threshold of arbitration applies only to *federal* courts and does not address the role of state courts. *See* 9 U.S.C. § 4 (regarding procedure to be used in "any United States district court" to initiate arbitration in cases presenting federal claims); *id.* § 3 (regarding procedure for obtaining a stay of litigation "brought in any of the courts of the United States" pending completion of arbitration); *Southland*, 465 U.S. at 16 n.10. Such a "federal procedural right . . . simply does not apply in a nonfederal forum." *Johnson v. Fankell*, 520 U.S. 911, 921 (1997).

Even if the FAA's procedural provisions supported a presumption against class arbitration in federal court, those provisions in no way bar states from authorizing their trial courts to make class certification decisions before sending cases to arbitration. *See Volt*, 489 U.S. at 476-477; *Southland*, 465 U.S. at 31 (O'Connor, J., dissenting) (state courts should be allowed to fashion their own procedures for enforcing the substantive federal rights, if any, that the FAA creates). There is no more cause for petitioner's concern (Pet. Br. 28) about potentially different state and federal threshold procedures for arbitration than there is about the routine use of

[19] This case does not present the question whether the FAA preempts state law that abrogates express waivers of rights to proceed on a class basis, such as by rendering unconscionable contracts that waive the right to proceed as a class. *See, e.g., Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2002); *State v. Berger*, 567 S.E.2d 265 (W. Va. 2002), *cert. denied sub nom Friedman's Inc. v. West Virginia*, 123 S.Ct. 695 (2002).

different procedures in state and federal courts under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See American Dredging Co. v. Miller*, 510 U.S. 443, 451-452 (1994) (despite potential disuniformity, Jones Act does not preempt state law on *forum non conveniens* for cases brought in state court under the Act).[20]

In light of the sovereign autonomy of the states to structure their own court procedures as they see fit, it is doubtful whether Congress could, consistent with constitutional principles of federalism, preempt state-court procedures for certifying a class at the threshold of arbitration. At a minimum, a plain statement of Congress's intent to do so should be required before state courts' procedural rules are ousted. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Yet the FAA says nothing whatsoever about state procedures, much less class arbitrations, apart from the general nondiscrimination principle it embodies. The states ordinarily "have great latitude to establish the structure and jurisdiction of their own courts," and a "neutral state rule regarding the administration of the state courts" should not lightly be preempted. *Fankell*, 520 U.S. at 919 (*citing, inter alia, Southland*, 465 U.S. at 33 (O'Connor, J., dissenting)); *Southland*, 465 U.S. at 19 (Stevens, J., concurring in part and dissenting in part) ("we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the States"). Any reading

[20] Whether to certify a class is plainly a procedural question. Indeed, if it were otherwise, Federal Rule of Civil Procedure 23 would run afoul of the Rules Enabling Act, 28 U.S.C. § 2072. Both federal and state class-action rules comfortably qualify as rules that regulate only procedure because they address the "*process* for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (emphasis added). In the arbitration context, the nature of the question whether to proceed on a class-wide basis is no different.

of the FAA to control state-court procedures for referral of cases to class arbitration raises constitutional doubts and should be avoided.

Petitioner seeks to sidestep the fact that FAA §§ 3 and 4 expressly apply only to federal courts by asserting that the parties nonetheless agreed that these sections would govern any arbitration under the contract, even one that never made it to federal court. Pet. Br. 16, 28-30. The Agreement supports no such interpretation. The sole sentence upon which petitioner relies states that "[t]his arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1." Pet. App. 110a. It refers only to FAA § 1, not § 3 or § 4, and its reference to § 1, defining "commerce" under the Act, establishes only that the parties thought that the contract affected interstate commerce within the meaning of the FAA. In the case of purely intra-state contracts, the FAA lacks even the limited preemptive force of its § 2 non-discrimination principle, and states are free to favor or disfavor arbitration relative to other forms of dispute resolution as they see fit.[21] In this case, even though the Agreement governs real property transactions occurring within the State of South Carolina and thus is arguably at the outer edge of Congress's regulatory power, the contract's reference to the FAA suggests that the parties contemplated that their agreement involved interstate

[21] *See, e.g., Ex Parte Kampis*, 826 So. 2d 819 (Ala. 2002) (owner's claim against in-state home construction company did not involve interstate commerce triggering FAA application); *Marina Cove Condo. Owners' Ass'n*, 34 P.3d 86 (2001) (dispute between Washington condominium owner and in-state condo owners' association regarding alleged construction defects did not involve interstate commerce for purposes of FAA).

commerce.[22] That limited reference lends no support to petitioner's contention that FAA § 4 language or case law governs this contract.

Champ is also inapposite because it addresses only the authority of a federal district court to order class arbitration, and not the authority of an *arbitrator* to proceed on a class basis if he so chooses, as Judge Ervin did here. Under the logic of *Champ*, a district court not only lacks power to order class arbitration, but equally lacks the power to enjoin it, thus leaving the matter to the arbitrator. In this case, the arbitrator's own decision to proceed on a class-wide basis moots any question here regarding whether the FAA would preempt a state trial court's order directing class arbitration.

Petitioner argues that the trial court's certification of a class in *Bazzle* before sending the case to arbitration "infected the arbitrations." Pet. Br. 34-35. That is not the case. The arbitrator exercised his authority to proceed with class arbitration in both the *Bazzle* and *Lackey* cases. In *Lackey,* the arbitrator decided the class certification question and the trial court subsequently affirmed the decision, whereas in *Bazzle*, the court made an initial class certification order before the case was referred to the arbitrator. After *Bazzle* was shifted to the arbitral forum, however, and Green Tree moved to decertify the class, the arbitrator made a *de novo* determination that "a class action should proceed in arbitration" based on his own "careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 84a. He independently "found that the requirements for class certification were met and that class certification was appropriate," *id.* at 86a, and did not even cite the state trial court's class certification decision. Further, he exercised his discre-

[22] The parties' contemplation was, until recently, potentially relevant to the question whether even Section 2 of the FAA was applicable to any particular state-court case. *See Allied-Bruce*, 513 U.S. at 269.

tion to reconfigure the *Bazzle* and *Lackey* classes so that each class dealt with only one type of transaction, and he excluded out-of-state transactions and opt-outs from the classes.[23]

In both cases, the Arbitrator's decision to proceed on a class-wide basis was just the kind of discretionary, procedural decision that, in the absence of contrary state-law or contractual directive, rests in an arbitrators' sole discretion. There is no reason in either *Bazzle* or *Lackey* to conclude that the arbitrator failed to appreciate that the decision was his to make. The fact that the arbitrator and the court agreed on the appropriateness of class certification is wholly unsurprising, given that the case was such an obvious candidate for class treatment. In any event, Green Tree's objection has never been that the wrong decision maker approved class arbitration here, but rather that its Agreement foreclosed class arbitration altogether. After all, if the error were that the court made a decision that should have been for the arbitrator, the remedy for resulting prejudice (had there been any) would have been to vacate and remand to the arbitrator, *see Garvey*, 532 U.S. at 510, a remedy that petitioner never sought here, could not

[23] When respondents urged the trial court to affirm the arbitrator's award to the class in *Lackey*, they did emphasize that the court had itself earlier approved class certification in identical circumstances in *Bazzle*. Petitioner contends (Pet. Br. 37) that respondents are thereby estopped from now claiming that the arbitrator's decision in *Lackey* was independent of the judge's certification decision in *Bazzle*. Respondents never argued, however, that the arbitrator was bound by the trial court's order. The arbitrator's own opinion, which thoroughly considers the relevant Rule 23 factors and does not mention *Bazzle*, speaks for itself. Moreover, the *Bazzle* court's certification of the class (like the court's approval of the class certification in *Lackey*) is a strength, not a weakness, in respondents' case. Even were this court to view the class certification question as one for the court and not the arbitrator, *see generally First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), that conclusion would not affect the outcome in this case because both decision makers were in agreement on the matter.

now seek, and in any event does not want. What petitioner urges is that no decision maker could have ordered class arbitration here.

Finally, even if it applied here, *Champ*'s reasoning is no more persuasive than petitioner's erroneous contract-language argument. The court in *Champ* found in § 4's requirement that district courts order arbitration "in accordance with the terms of the agreement" a negative implication that, where the parties "did not include in their agreement an express term providing for class arbitration," the district court could not order such proceedings. 55 F.3d at 276. That logic is flawed for the same reason that petitioner's contention that its agreement, which did not mention class arbitration, thereby prohibited it. *See* Point II, *infra*. The reference in § 4 to enforcement of the agreement "in accordance with [its] terms," like the similar language in this Court's § 2 cases, refers to enforcement of arbitration agreements on the same terms as other contracts, not a special rule requiring that all arbitrators' authorities be spelled out.[24]

In sum, the FAA, which says nothing whatsoever about class actions in state proceedings, simply does not speak to the threshold procedures through which *state courts* refer cases to arbitration, let alone the procedures that *arbitrators* in state cases should use once cases are referred to them. This Court in *Southland* let stand a California Supreme Court

[24] *Champ* also considered whether the FAA's silence on class proceedings permits federal courts to rely on Fed. R. Civ. P. 23 to certify classes for arbitration. 55 F.3d at 276. Federal Rule of Civil Procedure 81(a)(3) expressly makes the Federal Rules applicable to FAA proceedings "to the extent that matters of procedure are not provided for" in the FAA. *Champ* found no authority in Rule 81(a)(3) for a district court to certify a class for arbitration, however, because that rule "only applies to *judicial* proceedings under the FAA, 55 F.3d at 276, whereas class certification affects the ensuing arbitration. That reasoning, too, rests on procedural provisions applicable only in federal court.

decision to permit class-wide arbitration because Southland had not raised and the state courts had not passed on the question whether the state law was preempted by the FAA. 465 U.S. at 8-9. Petitioner here purports to assert the federal ground that was lacking in *Southland*. We have shown that there is no such preemptive force to the FAA.[25]

B. Congress Acted Reasonably in Not Blocking Class Arbitration

Seeking to erect a conflict where there is none on the face of the statute, petitioner characterizes class arbitration as "a bizarre and dangerous hybrid," and suggests that the FAA

[25] Strong concerns about whether *Southland* was correctly decided counsel, at a minimum, against any expansion here of the FAA's preemptive scope. In *Southland*, Justices O'Connor and Rehnquist would have held that FAA § 2 does not apply in state court. 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting). Justice Stevens in *Southland* would have found no preemption of the state law excluding wage claims from arbitration, 465 U.S. at 17-21 (concurring in part and dissenting in part), and in his dissent in *Perry*, he characterized *Southland* as having "rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend," 482 U.S. at 493 (Stevens, J., dissenting). *See*, *id.* at 494-495 (O'Connor, J. dissenting). In *Allied-Bruce*, Justices Scalia and Thomas would have held that the FAA does not apply in state courts, 513 U.S. at 284 (Scalia, J., dissenting); *id.* at 285-97 (Thomas, J., joined by Scalia, J., dissenting), whereas Justice O'Connor acquiesced on *stare decisis* grounds in the majority's decision to uphold *Southland* even while she thought is was "wrong" and "continue[d] to believe that Congress never intended the Federal Arbitration Act to apply in state courts," 513 U.S. at 283 (O'Connor, J., concurring). *See generally* Brief of Law Professors as *Amici Curiae* in Support of Respondents (setting forth arguments in favor of overruling *Southland*).

Because the judgment in this case is clearly correct even under *Southland*, we do not believe that the Court need decide here whether to overrule that decision, but if there were any conflict between *Southland* and the decision of the South Carolina Supreme Court, *Southland* should yield. *See* Brief of Law Professors as *Amici Curiae* in Support of Respondents.

thus should be construed to have preempted states from allowing such procedures absent express authorization in the arbitration agreement. Pet. Br. 41. In particular, petitioner and its *amici* raise the specter of due process concerns related to class arbitration. Those issues are not before this Court, where the question presented is limited to the statutory preemption issue. There is no basis in the record for any claim of due process violation, petitioner waived any such claim, Pet. App. 25a, and it is not at all clear, given Green Tree's bankruptcy, that petitioner would have standing to invoke the due process rights of class members.

Unnamed class members' due process rights were carefully preserved in these cases by the arbitrator's adherence to the best class action procedural protocols, including careful definition of the classes and the first-class mailing to each individual class member of a fully informative notice of opt-out rights.[26] *See Shutts*, 472 U.S. at 811 (describing

[26] The arbitrator approved the notice of the class arbitration that class counsel mailed to each class member. J.A. 17-23. The notice specified that the case was in arbitration, and was signed by the arbitrator. It stated in capital letters at the outset: "PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY PROCEEDINGS IN THIS LITIGATION." J.A. 17. The notice described the claims, the contours of the class, and the status of the case. It outlined class members' options and their consequences, including that persons opting out would "not be entitled to share in the benefits of any settlement or judgment if it is favorable to the Class," and would "not be bound by the settlement or judgment if it is adverse to the class." J.A. 19-20. Correspondingly, the notice specified that "[a]ny class member who does not request to be excluded will *automatically* be included in the Action as members of the Class represented by the Named Plaintiffs," and be "bound by the orders entered and notices hereafter given in this Action." J.A. 20 (emphasis in original). The Notice alerted class members of their right to enter an appearance through an attorney of their choice, and stated that if they chose not to do so they would be represented by class counsel, whose names and addresses were listed.

constitutionally adequate notice). Even if this Court found such concerns relevant to the FAA preemption question presented, there is no reason to think that states and state arbitrators cannot design workable procedures for facilitating arbitration consistent with due process requirements. Indeed, the process followed in this case refutes such a suggestion. In any event, such matters can and should be litigated on a case-by-case basis, and speculation about due process issues does not warrant reading into the FAA a preemptive rule that Congress did not adopt.

Petitioner relatedly contends that class arbitration should be barred because it "cannot bind the non-representative class members." Pet. Br. 45. That is not the case. The unnamed class members here, each of whom signed the same arbitration agreement as the class representatives, and each of whom elected not to opt out of the class, are validly subject to the decision by the arbitrator. These facts distinguish this case from *EEOC v. Waffle House*, 534 U.S. 279 (2002), on which petitioner principally relies. There, the Court correctly noted that agreements to arbitrate cannot bind parties, such as the EEOC in that case, who never agreed to arbitrate at all. *Id.* at 294. *See also First Options* 514 U.S. at 946. Here, however, all the unnamed class members did agree to final and binding arbitration on the same terms as did the class representatives, and acquiesced to arbitration before Judge Ervin. There is no reason to believe the final award here has less binding effect on the unnamed class members than any arbitral award has on parties to an arbitration. *See, e.g.*, *Waffle House*, 534 U.S. at 297 (noting that "ordinary principles of . . . res judicata . . . may apply" to prevent the EEOC from obtaining victim-specific relief for an employee who already obtained relief through arbitration); S.C. Code.

J.A. 21. It listed class counsel's toll-free number and directed class members to call if they had any questions. J.A. 22.

Ann. § 15-48-150 (1976 Supp. 2001) (arbitration awards shall be "enforced as any other judgment or decree"); *cf.* FED. R. CIV. P. 8(c) (specifying "arbitration and award" as an affirmative defense for pleading purposes). No member of the respondent class has sought relief in any further proceeding beyond what was obtained in this case, and there is no basis to believe that any South Carolina court would honor any such request.

Petitioner's real concern in opposing class arbitration is not to protect unnamed class members' procedural rights, but to benefit from their lack of knowledge about their rights and the difficulty of securing counsel in light of the modest sums at issue. Far fewer claimants will ever sue individually in the absence of the ability to proceed as part of a class. It is the potential radically to reduce legal exposure that appeals to petitioner and its *amici*. Class action rules at the state as well at the federal level, however, serve the entirely valid objective of overcoming obstacles posed by lack of information or modest claim size in the interests of fuller and more efficient law enforcement.[27] From the perspective of absent class members, class arbitration is not more "complex, expensive and time-consuming" (Pet. Br. 40) than individual arbitration, but, on the contrary, captures efficiencies that

---

[27] This Court emphasized that very purpose in *Shutts* when it held that the Due Process Clause did not require "opt-in" rather than "opt-out" class procedures under the Kansas class action rule. Recognizing that a typical class member might not "file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution," the Court rejected the defendant's argument that due process forecloses "opt-out" classes. 472 U.S. at 813; *see Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *Deposit Guaranty Nat. Bank v. Roper*, 446 U.S. 947 (1980).

often make the difference for them between some relief and none.

Petitioner does not oppose class arbitration because it believes that there should have been 3,700 individual proceedings instead of one class arbitration. Green Tree and its *amici*, like other parties with potential exposure to large groups of people, oppose class arbitration in the knowledge that, "because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable." Sternlight, *Arbitration Meets the Class Action,* 42 Wm. & Mary L. Rev. 1, 8 (2000). Nor is petitioner insisting, as does federal securities regulation, that rights to pursue class-wide relief in court must be preserved notwithstanding agreements to arbitrate.[28] Instead, petitioner and its *amici* "hope they have found a surreptitious way to defeat the feared class action," *id.* at 5, by establishing a rule that standard-form arbitration contracts that do not expressly provide for class treatment implicitly waive any right to bring class claims. To that end, petitioner urges this Court to displace South Carolina law with a federal rule that would presumptively *disfavor arbitration* of class claims. It is petitioner's proposal, not the decision below, that is hostile to arbitration. Petitioner has pointed to no evidence that Congress even sought to regulate state law on arbitral procedures, much less that it sought to bar class actions where state law permits them on a non-discriminatory basis in litigation and arbitration.

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

---

[28] *See* NASD Code of Arbitration Procedure, § 10301(d)(3), (prohibiting arbitration of class claims even where putatively covered by arbitration agreement in favor of litigation all such claims).

Respectfully submitted,

MARY LEIGH ARNOLD
MARY LEIGH ARNOLD, P.A.
P.O. Box 265
Mt. Pleasant, SC 29465

STEVEN W. HAMM
RICHARDSON, PLOWDEN,
CARPENTER & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, SC 29202

BRADFORD P. SIMPSON
D. MICHAEL KELLY
B. RANDALL DONG
SUGGS & KELLY LAWYERS, P.A.
P.O. BOX 8113
COLUMBIA, SC 29202-0008

T. ALEXANDER BEARD
BEARD LAW FIRM
1002 ANNA KNAPP BLVD
MT. PLEASANT, SC 29464

CHARLES L. DIBBLE
DIBBLE LAW OFFICES
P.O. DRAWER 1240
COLUMBIA, SC 29202

CORNELIA T.L. PILLARD
Counsel of Record
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave, NW
Washington, D.C. 20001
(202) 662-9391

CHARLES L.A. TERRENI
P.O. BOX 11904
COLUMBIA, SC 29211

DANIEL WEBSTER WILLIAMS
BEDINGFIELD & WILLIAMS
P.O. BOX 616
BARNWELL, SC 29812

CHARLES RICHARD KELLY
C. RICHARD KELLY, PA
POST OFFICE BOX 11648
COLUMBIA, SC 29211

THOMAS MATTHEW FRYAR
2614 BURNEY DR.
COLUMBIA, SC 29205

Counsel for Respondents

March 27, 2003

FILED
APR 15 2003
OFFICE OF THE CLERK

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF OF PETITIONER

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
VIRGINIA M. VANDER JAGT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

April 15, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONERS	1
I. IMPOSITION OF CLASS ARBITRATION "WITHOUT ANY CONTRACTUAL OR STATUTORY DIRECTIVE TO DO SO" VIOLATES THE FAA'S REQUIREMENT THAT ARBITRATION AGREEMENTS BE ENFORCED "IN ACCORDANCE WITH THEIR TERMS"	4
A. This Court's Cases Make Clear That The FAA Requires That Agreements To Arbitrate Be Enforced "In Accordance With Their Terms"	5
B. The Decision Below Violated The FAA By Imposing Class Arbitration On The Parties' Agreement Without Any "Contractual Directive To Do So"	7
II. ARBITRATOR DISCRETION CANNOT RESCUE THE DECISION BELOW BECAUSE CLASS ARBITRATION WAS IMPOSED ON THE ARBITRATOR, WHO HAD NO DISCRETION TO EXCEED HIS CONTRACTUAL POWERS	13
A. The Imposition Of Class Arbitration Was Not A Discretionary Exercise Of Arbitral Powers Under The Arbitration Agreements	14
B. The Arbitrator's Contractual Power To Bind The Bazzles And Lackey Did Not Extend To The Parties To Thousands Of Other Contracts	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

A.T. Conner v. *Alvarez*, 328 S.E.2d 334 (S.C. 1985) 9
AT&T Techs., Inc. v. *Communications Workers of Am.*, 475 U.S. 643 (1986) 16
Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 5, 6, 10, 13
Blakeley v. *Rabon*, 221 S.E.2d 767 (S.C. 1976) 9
C.A.N. Enters., Inc. v. *South Carolina Health & Human Servs. Fin. Comm'n*, 373 S.E.2d 584 (S.C. 1988) 9, 10
Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 8
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 1
Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996) 6
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) ..... *passim*
Eljer Mfg., Inc. v. *Kowin Dev. Corp.*, 14 F.3d 1250 (7th Cir. 1994) 19
Episcopal Hous. Corp. v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979) 8
First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) ..... *passim*
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 7
Gilstrap v. *Culpepper*, 320 S.E.2d 445 (S.C. 1984) 2, 9, 10
Goode v. *St. Stephens United Methodist Church*, 494 S.E.2d 827 (S.C. Ct. App. 1997) 11, 17
Howsam v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002) 6, 16, 19
John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964) 16

TABLE OF AUTHORITIES – continued

Page

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) ..... *passim*
McPherson v. *J.E. Sirrine & Co.*, 33 S.E.2d 501 (S.C. 1945) 9
Myrtle Beach Lumber Co. v. *Willoughby*, 274 S.E.2d 423 (S.C. 1981) 13
New Hampshire v. *Maine*, 532 U.S. 742 (2001) 15
Parker v. *Byrd*, 420 S.E.2d 850 (S.C. 1992) 9
Perry v. *Thomas*, 482 U.S. 483 (1987) 5, 6, 13
Scherk v. *Alberto Culver Co.*, 417 U.S. 506 (1974) 6
Stokes v. *Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000) 11, 17
Touchberry v. *City of Florence*, 367 S.E.2d 149 (S.C. 1988) 11, 17
United Steelworkers of Am. v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) 16
Volt Info. Scis., Inc. v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) ..... *passim*
Zabinski v. *Bright Acres Assocs.*, 553 S.E.2d 110 (S.C. 2001) 12

STATUTES

9 U.S.C. § 2 ..... 5, 6
9 U.S.C. § 10(a)(4) ..... *passim*
S.C. Code Ann. § 37-6-101 *et seq.* 4
§ 37-10-105(a) 4

SCHOLARLY AUTHORITIES

5 Margaret N. Kniffin, *Corbin on Contracts* (rev. ed. 1998) 9
11 Richard A. Lord, *Williston on Contracts* (4th ed. 1999) 9

REPLY BRIEF OF PETITIONERS

In its opening brief, Green Tree demonstrated that the South Carolina Supreme Court's decision to impose class-wide arbitration upon the parties' agreement to arbitrate "without any contractual or statutory directive to do so," Pet. App. 21a, could not be reconciled with the Federal Arbitration Act's ("FAA's") requirement that state and federal courts enforce arbitration agreements "according to their terms," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 476 (1989); *accord Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995). Further, the state court's ruling that an ""intrusion upon the contractual aspects of the relationship"" was justified by its own views of "efficiency," "equity" and "judicial economy," Pet. App. 21a-22a, was contrary to the core mandate of the FAA "rigorously" to enforce agreements to arbitrate, *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Finally, Green Tree demonstrated that the improper imposition of class arbitration onto the parties' agreement infected the arbitral proceedings and, in all events, that the expansion of the arbitration agreements in the bilateral Bazzle and Lackey contracts to encompass claims by thousands of third parties arising from their separate contracts was well beyond the arbitrator's power. See 9 U.S.C. § 10(a)(4); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 946 (1995).

Respondents call none of these conclusions into question. As shown below, their arguments fail because, under the FAA, a court may not impose class-arbitration or any other judicial mandate onto a private arbitration agreement without a contractual directive to do so. Respondents are correct that ""there is no federal [policy] favoring arbitration under a certain set of procedural rules,"" Resp. Br. 21 (quoting *Volt*, 489 U.S. at 476), but they omit that the Court in *Volt* explained, in the same sentence, that there is a "federal

policy" under the FAA "to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476; see Part I, *infra*. Moreover, because arbitration under the FAA is a matter of "consent and not coercion," an arbitrator exceeds his delegated powers, 9 U.S.C. § 10(a)(4), if he purports to resolve – through class arbitration, consolidation or otherwise – the claims of thousands of other individuals without a contractual directive to do so. Simply put, an arbitrator may not employ procedural devices that extend his power beyond what the contract specifies. See Part II, *infra*.

Before addressing Respondents' arguments in full, it is necessary to clarify the record in a number of respects. First, Respondents principally argue that the court below "applied ordinary state contract doctrine to hold that the arbitration clause . . . permits class-wide arbitration in the arbitrator's discretion as authorized by South Carolina law." Resp. Br. 17-18. That is pure fantasy. The South Carolina Supreme Court did *not* hold that the parties actually intended to authorize class arbitration. Rather, it ruled, that by construing contract language against Green Tree, Pet. App. 19a, the arbitration agreement became "silent" regarding class arbitration, *id.* at 21a, 22a. Thereafter, it relied upon its prior decision that "a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." *Id.* at 21a. Based upon that extra-contractual principle, the court concluded that it "would permit class-wide arbitration" in this case. *Id.*

Under South Carolina law, generally applicable contract principles dictate that "'[w]ords cannot be read into a contract which import intent wholly unexpressed when the contract was executed.'" *Gilstrap* v. *Culpepper*, 320 S.E.2d 445, 447 (S.C. 1984). Recognizing its departure from general contract law, the court below acknowledged that imposition of class arbitration would result in an "intrusion upon the contractual aspects of the relationship," but nevertheless "h[eld] that

class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice," Pet. App. at 22a. That ruling "do[es] violence to the policies behind by the FAA" by preventing private parties from "structur[ing] their arbitration agreements as they see fit" and allowing courts unilaterally to modify the "contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.

Second, under the FAA, neither a court nor an arbitrator may impose obligations on an arbitration proceeding without a contractual directive to do so. Unlike litigation, which is based upon the coercive power of the state, arbitration is based exclusively upon private contract. *Waffle House, Inc.*, 534 U.S. at 294; *First Options*, 514 U.S. at 943. Thus, although court litigation of a party's claims may be pursued through a class action without contractual authorization, Resp. Br. 24-25 & n.10, in contrast, class arbitration may *not* be imposed without the express contractual agreement of the parties in their agreement to arbitrate. Indeed, the FAA provides that arbitral awards should be set aside where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4). Where, as here, an arbitration agreement does not authorize an arbitrator to resolve claims by third parties, the arbitrator may not extend his power through class arbitration.

Finally, in an apparent effort to distract attention from the legal issues actually presented, Respondents (i) attempt to portray Green Tree as a bad actor that knowingly violated settled South Carolina law, (ii) imply that Green Tree's conduct caused actual damage to thousands of South Carolina residents, and (iii) argue that the statutory provision at issue here can be enforced effectively only through a class-action mechanism. Resp. Br. 2, 5-8, 19-20. These contentions do not withstand scrutiny. Respondents ignore that the basis for the arbitrator's finding of liability was "the ruling of the South Carolina Supreme Court in *Tilley* v. *Pacesetter*," Pet. App. 69a, 91a, a decision handed down in 1998, years *after*

the loans at issue. Similarly, their assertion that Green Tree had "[y]ears before" been "held liable . . . for the same violations at issue here" Resp. Br. 2, is unsupported and unsupportable. Further, Respondents' baseless claims of "predatory lending," Resp. Br. 2, "usurious interest rates," or "other unfair contract terms," *id.* at 5, also are unsupported and belied by their failure even to attempt to show "actual damages," Pet. App. 69a, 96a.[1] Nor can Respondents validly contend that class arbitration was necessary to vindicate or enforce this statutory provision. See Pet. Br. 33-34. The South Carolina legislature has barred class actions based upon the statute at issue while authorizing the recovery of attorneys' fees and statutory damages without a showing of actual damages, see S.C. Code Ann. § 37-10-105(a), and the conduct of parties such as Green Tree remains subject to oversight by regulatory agencies, *e.g.*, *id.* § 37-6-101 *et seq.*

I. IMPOSITION OF CLASS ARBITRATION "WITHOUT ANY CONTRACTUAL OR STATUTORY DIRECTIVE TO DO SO" VIOLATES THE FAA'S REQUIREMENT THAT ARBITRATION AGREEMENTS BE ENFORCED "IN ACCORDANCE WITH THEIR TERMS."

The judgment below violates the FAA because the South Carolina Supreme Court failed to apply "ordinary state contract doctrine," Resp. Br. 17, and instead approved the imposition of class arbitration onto the parties' agreement without any contractual directive to do so, Pet. App. 21a. Contrary to Respondents' argument, the FAA protects not only the parties' "choice to arbitrate rather than litigate," Resp. Br. 23, but also requires that courts "give effect to the

[1] Respondents' claim that "[m]any purchasers did not understand they were securing the credit transaction with a mortgage on their home," Resp. Br. 7, cannot be reconciled with, for example, the Bazzles' Contract, which stated, "You also agree to give us a separate mortgage" "on the real property described below," J.A. 33, and listed, the street address, city, state, and zip code of the mortgaged property, *id.*

contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479. Continued enforcement of that long-standing mandate would not, as Respondents predict, result in "wholesale federalization" of "arbitration-contract interpretation," Resp. Br. 18, but would mean that a court may not, as here, construe an "[arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987). The South Carolina Supreme Court's hostility to enforcing the arbitration agreements actually entered into by private parties according to their terms warrants reversal of the judgment below.

A. This Court's Cases Make Clear That The FAA Requires That Agreements To Arbitrate Be Enforced "In Accordance With Their Terms."

Respondents' suggestion that the FAA protects only "the parties' choice to arbitrate rather than litigate," Resp. Br. 23, cannot be squared with this Court's interpretation of Section 2 of the FAA. As this Court has explained, Section 2 puts arbitration "'agreements upon the same footing as other contracts,'" *Allied-Bruce Terminex Cos.* v. *Dobson*, 513 U.S. 265, 271 (1995), and "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," *Volt*, 489 U.S. at 478; see also *Mastrobuono*, 514 U.S. at 53-54 (same).

As Green Tree showed previously, Pet. Br. 21-23, the "basic objective" of the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (internal quotation marks and citations omitted). These requirements are incompatible with the suggestion that courts are free to rewrite agreements to arbitrate without regard to the parties' contractual directives so long as, in the end, they permit arbitration. That suggestion cannot be

reconciled with the FAA's basic purpose: "'to put arbitration provisions on the same footing as a contract's other terms.'" *Allied-Bruce*, 513 U.S. at 275.

Nor does the FAA insulate from review state-court determinations regarding the proper scope of arbitration agreements. Resp. Br. 26 (stating that FAA "trusts" courts' interpretation of arbitration agreements). In *Volt*, for instance, this Court reviewed whether a state court's interpretation of an arbitration contract conflicted with the FAA, 489 U.S. at 476, and upheld that court's interpretation because it had, as the FAA requires, enforced the agreement in accordance with its terms, *id.* at 473 n.4, 476. Similarly, in *Perry*, this Court explained that a state court could not "construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." 482 U.S. at 493 n.9. Finally, in *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996), the Court reiterated that Section 2 of the FAA "precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* at 687.

The continued application of these principles in no way threatens a "wholesale federalization of matters of state law." Resp. Br. 18. Rather, the FAA ensures only that courts are not hostile to arbitration agreements and that they steadfastly enforce the intentions of the parties as written. *E.g.*, *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 511 (1974) (FAA requires that courts "place arbitration agreements 'upon the same footing as other contracts'") (quoting H.R. Rep. No. 68-91, at 1, 2 (1924)); see *Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2002) (Thomas, J., concurring in judgment). In contrast, adoption of Respondents' approach would constitute a radical departure from settled law that would allow courts to resurrect the same "judicial hostility" to arbitration by conditioning enforcement of the parties' agreement to arbitrate on judicial imposition of terms dictated

not by the parties' consent, but by a court's own notions of "efficiency," equity," and "judicial economy." Pet. App. 22a.

This Court has explained that the FAA permits parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Under Respondents' view, a party's decision to choose arbitration instead of litigation would be an empty one because a court freely could rewrite the terms of that private arbitration agreement based upon its own policy preferences so long as the court ultimately required arbitration.

B. The Decision Below Violated The FAA By Imposing Class Arbitration On The Parties' Agreement Without Any "Contractual Directive To Do So."

The decision below violated the FAA because the South Carolina Supreme Court ordered class arbitration even though it acknowledged there was no "contractual or statutory directive to do so." Pet. App. 21a. That ruling is flatly contrary to general principles of contract law and therefore violates the FAA. Respondents utterly abandon the holding of the court below and now suggest that the arbitration agreements "can be read affirmatively to authorize [class arbitration]." Resp. Br. 31; *id.* at 31-34. Their arguments should be rejected.

1. As Respondents recognize elsewhere, "the state's high court is the ultimate arbiter of the meaning of the contract terms." *Id.* at 28. Here, South Carolina's high court did not conclude that the parties had intended to authorize class-wide arbitration; instead, it determined that the arbitration agreements were "silent" regarding "class-wide arbitration." Pet. App. 21a. That predicate determination was essential to the Court's ultimate ruling: "we adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold that

class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.[2]

After concluding that the parties' agreement was "silent" on the issue of class arbitration, the court applied its decision in *Episcopal Housing Corp.* v. *Federal Insurance Co.*, 255 S.E.2d 451, 452 (S.C. 1979), where it had "authorized consolidation of the claims" in an arbitration "absent contractual or statutory authority." Pet. App. 18a. Based upon *Episcopal Housing*, the court imposed class arbitration here "without any contractual or statutory directive to do so." *Id.* at 21a. Under that analysis, courts in South Carolina can modify and rewrite private arbitration agreements to impose whatever requirements they deem appropriate so long as they conclude that the arbitration agreement does not expressly foreclose that result.

The parties did not agree to be bound by any arbitration-specific provision of South Carolina law; rather, they expressly agreed that their arbitration agreements would be "governed by the [FAA]," Pet. App. 110a, which this Court has held requires enforcement of such agreements "according to their terms," *e.g.*, *Volt*, 489 U.S. at 476; *Mastrobuono*, 514 U.S. at 54. Allowing a court "to read [class arbitration] into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Champ* v. *Siegel*

[2] As Respondents note, Resp. Br. 30 (citing Pet. App. 19a), the court below concluded that a portion of the "clause providing for arbitration of 'disputes, claims, or controversies arising from or relating to this contract, or the relationships which result from *this contract*,'" "creates an ambiguity," and "construed" that ambiguity "against the drafting party." Pet. App. 19a. Although the court never identified the "ambiguity," the upshot of its analysis was *not* that the parties agreed or authorized class-wide arbitration, but that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.* This was necessary to the court's holding that "class-wide arbitration may be ordered when the arbitration agreement is silent." Pet. App. 22a.

Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (first alteration added) (quoting *New England Energy, Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting)).

By no stretch of the imagination does the South Carolina Supreme Court's ruling constitute a "routine application of ordinary state contract law principles." Resp. Br. 19. Under generally applicable contract law in South Carolina, as elsewhere, "'[w]ords cannot be read into a contract which import intent wholly unexpressed when the contract was executed.'" *Gilstrap*, 320 S.E.2d at 447 (holding that interest charge could not be imposed on contract that was "silent as to an interest rate") (internal quotation marks omitted); see *Parker* v. *Byrd*, 420 S.E.2d 850, 852 (S.C. 1992) (reiterating same principle of general contract law); *Blakeley* v. *Rabon*, 221 S.E.2d 767, 769 (S.C. 1976) (same); *McPherson* v. *J.E. Sirrine & Co.*, 33 S.E.2d 501, 509-10 (S.C. 1945) (same).[3] Put another way, in South Carolina, as elsewhere, courts "are without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enters., Inc.* v. *South Carolina Health & Human Servs. Fin. Comm'n*, 373 S.E.2d 584, 587 (S.C. 1988); see *A.T. Conner* v. *Alvarez*, 328 S.E.2d 334, 336 (S.C. 1985) (explaining that court's "'duty is limited to the interpretation of the contract made by the parties themselves'"); *Gilstrap*, 320 S.E.2d at 447 (same).

The South Carolina Supreme Court's determination that a "state court may order consolidation" and class-wide arbitration "of claims subject to mandatory arbitration without

[3] *Accord* 11 R.A. Lord, *Williston on Contracts* § 31.5, at 299 (4th ed. 1999) ("court must enforce [the contract] as drafted by the parties, according to the terms employed, and may not make a new contract for the parties or rewrite their contract while purporting to interpret or construe it") (footnotes omitted); 5 M.N. Kniffin, *Corbin on Contracts* § 24.19, at 184 (rev. ed. 1998) ("courts do not make a contract for the parties and . . . the parties must be content to perform and to receive performance in accordance with whatever agreement they themselves chose to form") (internal quotation marks and citation omitted).

any contractual or statutory authority to do so," Pet. App. 21a, is directly at odds with generally applicable principles of contract law. *E.g.*, *Gilstrap*, 320 S.E.2d at 447; *C.A.N. Enters., Inc*, 373 S.E.2d at 586. That court's abandonment of general principles of contract law in favor of a "different" rule for the construction of arbitration agreements, *Perry*, 482 U.S. at 493 n.9, is contrary to the FAA, which requires that arbitration be put "'upon the same footing as other contracts,'" *Allied-Bruce*, 513 U.S. at 281 (quoting *Volt*, 489 U.S. at 474). Indeed, reversal of the judgment below is appropriate even under the approach advocated by Respondents, who concede that "the FAA displaces state-law principles that *target* arbitration agreements for special or different treatment." Resp. Br. 23-24; see also *Perry*, 482 U.S. at 493 n.9.

2. Unable to defend the decision below on its terms, somewhat ironically, Respondents attempt to substitute their own interpretation of the agreement for that of the South Carolina Supreme Court, arguing that the agreement "can be read affirmatively to authorize [class arbitration]." Resp. Br. 31-36. Respondents, however, previously informed this Court that the "arbitration agreement" does not "speak[] to the question of class arbitrations." Opp. at 12. Moreover, Respondents argue elsewhere that this Court has no authority to review the South Carolina Supreme Court's "reading of the Agreement." Resp. at 26. In this case, the South Carolina Supreme Court concluded that the arbitration agreements were "silent" on the issue of class-wide arbitration and relied upon arbitration-specific precedent to impose additional terms and obligations that the court below believed furthered "judicial economy." Pet. App. 22a.

Here, there can be no question that the parties did not authorize class-wide arbitration. To the contrary, the agreements by their terms authorize only bilateral arbitration by two contractually defined entities, "you" and "us," and dictate the manner in which those parties would choose the

arbitrator who would resolve their disputes. J.A. 33, 35. The notion that the "clause referring to 'arbitration by one arbitrator selected by us with consent of you,'" Resp. Br. at 35, authorizes the arbitrator to resolve claims advanced by thousands of parties other than "you" and "us" is absurd. See *First Options*, 514 U.S. at 942, 946 (holding that arbitration contract could not bind non-parties).

Arbitration is a contractual right. Under general principles of South Carolina contract law, one party (*e.g.*, the Bazzles or Lackey) cannot enforce the arbitration rights of other parties (*e.g.*, the unnamed class representatives) without a contractual directive to do so. Contrary to their arguments, Resp. Br. 38-39, the generally applicable rule of contract law is that "an individual who is not a party to a contract may not enforce it." *Stokes* v. *Westinghouse Savannah River Co.*, 206 F.3d 420, 429 (4th Cir. 2000) (applying South Carolina law); *Touchberry* v. *City of Florence*, 367 S.E.2d 149, 150 (S.C. 1988) (setting forth background "presumption" that "contract is not enforceable" by third parties); *Goode* v. *St. Stephens United Methodist Church*, 494 S.E.2d 827, 833 (S.C. Ct. App. 1997) ("a third party not in privity of contract with the contracting parties has no right to enforce a contract"). Thus, absent contractual authorization, neither the Bazzles nor Lackey would have the right to enforce the arbitration rights reflected in agreements to which they were not parties. Recognizing as much, Respondents argue that, "in the *context* of a class action, the reference to 'you' may be read as plural." Resp. Br. 36 n.17 (emphasis added). But this argument assumes that the parties agreed to class arbitration, and that simply begs the question. The proper "context" here is the contract entered into by the parties, which defined "'You'" to "mean[] each Buyer above," and defined "'us'" to "mean[] the Seller above, its successors and assigns." J.A. 33, 35.

Respondents' own efforts at contract interpretation fare no better. Their claim that the parties' "choice-of-law clause"

authorized class arbitration because South Carolina law "permits class arbitration in the absence of contract language specifically forbidding it," Resp. Br. 2, 3, 32, constitutes a blatant bootstrap argument. The only support for this "principle" of South Carolina law is the decision under review. Unlike *Volt*, inclusion of a general choice-of-law provision governing the substantive aspects of the contract could not mean that the parties, through silence, agreed to class-wide arbitration where the South Carolina Supreme Court explained that it had never before "considered whether or not class-wide arbitration may be ordered when the arbitration agreement is silent." Pet. App. 17a. To the contrary, the precedent cited by Respondents, Resp. Br. 32, makes clear that in South Carolina "the inclusion of a governing [state] law provision in an arbitration agreement . . . does not necessarily require the application of state, rather than federal, arbitration law," *Zabinski* v. *Bright Acres Assocs.*, 553 S.E.2d 110, 117 (S.C. 2001). This Court reached the same conclusion in *Mastrobuono*, 514 U.S. at 64, holding that a general "choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." *Id.* In all events, Respondents' argument, Resp. Br. 32 & n.16, simply ignores that the court below determined that the "arbitration agreements expressly state that they . . . are governed by the FAA." Pet. App. 11a.[4]

Respondents' attempt to save the judgment below by plucking snippets from the arbitration clause – Resp. 32-33 ("all powers," "all disputes," and "'equitable' powers") – without regard to the principle that they must be read in connection with the contract as a whole cannot be justified under general principles of contract construction. As this Court has explained, a contract "should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono*, 514 U.S. at 63; see *Myrtle Beach Lumber Co.* v. *Willoughby*, 274 S.E.2d 423, 425 (S.C. 1981) ("[i]n construing an agreement, consideration should be given to all of the verbiage"). Here, the language relied upon by Respondents cannot be considered in isolation from the fact that the arbitrator who is to wield contractually granted "powers" to resolve "all disputes" was chosen by the specific parties to the contracts to resolve only their disputes. Pet. App. 110a.

[4] Respondents' suggestion that the parties intended to be governed *only* by the definitional section of the FAA, but not by its remaining provisions, Resp. Br. 42, is specious and ignores the ruling of the court below that the Bazzles' and Lackey's arbitration agreements were to be "governed by the FAA." Pet. App. 11a & n.9.

Respondents' final contention that the parties authorized all procedures that were not expressly foreclosed, Resp. Br. 33-34, simply underscores the hostility to private bilateral agreements to arbitrate inherent in their position. Under Respondents' reasoning, the South Carolina Supreme Court would have been entitled to dictate the precise conduct of the parties' arbitration unless the parties, in advance, specifically identified and expressly rejected every such possible contingency. Absent a lengthy recitation of the precise conduct of arbitration, the South Carolina Supreme Court would have carte blanche to impose the entirety of the South Carolina Rules of Civil Procedure onto the parties' agreement and thereby recreate, in an arbitral setting, state-court litigation. That is not an "ordinary principle of contract" law, but is instead nothing less than a power to rewrite the parties' arbitration agreements in a manner squarely foreclosed by the FAA. See *Perry*, 482 U.S. at 492; *Allied-Bruce*, 513 U.S. at 271.

II. ARBITRATOR DISCRETION CANNOT RESCUE THE DECISION BELOW BECAUSE CLASS ARBITRATION WAS IMPOSED ON THE ARBITRATOR, WHO HAD NO DISCRETION TO EXCEED HIS CONTRACTUAL POWERS.

Respondents cannot dispute that "'[a]rbitration under the [FAA] is a matter of consent, not coercion," *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479) (second alteration in original), and that an arbitration contract "cannot

bind a nonparty," *id.* These principles, coupled with the South Carolina Supreme Court's determination that the arbitration agreements were "silent" regarding class arbitration, Pet. App. 22a, compel the conclusion that class arbitration could not be imposed by the courts or by the arbitrator. See 9 U.S.C. § 10(a)(4). Respondents seek to avoid that result by arguing that the FAA nevertheless permitted the arbitrator to determine whether to conduct a class arbitration, and that such a determination is subject to deferential judicial review. See Resp. Br. 20-22, 43-45. These arguments mischaracterize the proceedings below and misstate the applicable law.

A. The Imposition Of Class Arbitration Was Not A Discretionary Exercise Of Arbitral Powers Under The Arbitration Agreements.

As Green Tree showed previously, Pet. Br. 34-37, Respondents are flatly mistaken in contending that "the arbitrator decided to proceed on a class-wide basis in both cases." Resp. Br. 2; see *id.* at 43. In doing so, Respondents repeatedly conflate the issue whether the arbitration agreements authorized class arbitration, and the decision to certify a class assuming there was such authority. *Id.* at 44 n.23, 43-44. Only the abritrator's power to conduct class arbitration is at issue here.

On that issue, with regard to the *Bazzle* proceeding, Respondents cannot and do not dispute that the trial court, before referring the case to arbitration, ordered that it proceed as a class, see *id.* at 11-12, and dictated that class-arbitration "proceed on an opt-out basis," Pet. App. 3a-4a. Respondents seek to undermine these facts by quoting a portion of the arbitrator's opinion from the *Lackey* proceeding and representing, mistakenly, that these statements were made in the *Bazzle* proceeding. Resp. Br. at 43 (quoting Pet. App. 84a). Simply put, the arbitral award in the Bazzle proceeding must be set aside because the trial court imposed class

arbitration onto the parties' agreement in a manner foreclosed by the FAA.

Similarly, Green Tree previously showed that the *Bazzle* court's ruling also infected the conduct of the *Lackey* proceeding. Pet. Br. 36-37. There can be no doubt that the erroneous decision of the trial court in *Bazzle* affected the *Lackey* arbitration. As Respondents themselves put it in their Motion to Confirm the arbitral award in *Bazzle*, any decision by the arbitrator in *Lackey* that "the case could proceed as a class action" was simply "a reaffirmation and/or adoption of [the *Bazzle*] Court's prior determination." J.A. 31-32 n.2.

Further, Respondents offer no authority in response to Green Tree's showing of judicial estoppel and instead admit that they "did emphasize [to the *Lackey* arbitrator] that the court had itself earlier approved class certification in identical circumstances in *Bazzle*." Resp. Br. 44 n.23. Indeed, the case for judicial estoppel is particularly strong here because Respondents argued to the *Lackey* arbitrator that "the law of this case compels class arbitration," R. App. 518, and the *Lackey* arbitrator, who expressly relied upon the "briefs of the plaintiffs," ordered class arbitration, *id.* at 73. Thus, principles of judicial estoppel prevent Respondents, who "'prevail[ed] in one phase of [this] case on an argument'" to "'rely[] on a contradictory argument to prevail in another phase.'" *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

B. The Arbitrator's Contractual Power To Bind The Bazzles And Lackey Did Not Extend To The Parties To Thousands Of Other Contracts.

In all events, the decision below affirming the arbitral awards still must be reversed because the arbitrator had no power under the Bazzles' and Lackey's contracts to bind thousands of other individuals who were not parties to those agreements. See 9 U.S.C § 10(a)(4). Confirming that the FAA prohibits an arbitrator from arrogating powers that the

parties have not granted in their arbitration agreement would not, as Respondents warn, cause arbitrations to "grind to a halt." Resp. Br. 30. Rather, ensuring that arbitrators do not exceed the scope of the powers delegated to them promotes arbitration by securing "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.

1. In arguing that Green Tree seeks to create a "federal presumption against class arbitration," Resp. Br. at 37 (capitalization omitted), *id.* at 24-25 & n.10, Respondents ignore the sharp distinction between litigation, which is a matter of coercion, and arbitration, which derives from the parties' consent. Under the FAA, arbitration is "simply a matter of contract between the parties; . . . a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943; see *Howsam*, 123 S. Ct. at 591 ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (alteration in original; internal quotation marks omitted). Unlike courts of general jurisdiction, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate [is] of contractual origin . . . ."). And, unlike a court, an arbitrator "is not a public tribunal imposed upon the parties by superior authority" and "has no general charter to administer justice for a community which transcends the parties," but is instead "part of a system of self-government created by and confined to the parties." *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (internal quotation marks omitted).

Because "'[a]rbitration under the [Federal Arbitration Act] is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294, the issue is not, as Respondents would have it,

whether the agreements had "limiting language" excluding such authority or constraining the arbitrator, Resp. Br. 35, or a "presumption" against class-wide arbitration, *id.* at 40; see also *id.* at 3-4, 20, 33-34. Rather, the issue under the FAA is whether the parties, through their agreements to arbitrate, *authorized* the arbitrator to conduct class-wide arbitration that would resolve not only the claims of the parties who initiated arbitration, but also the claims of thousands of other individuals. See 9 U.S.C. § 10(a)(4); *First Options*, 514 U.S. at 943. That legal principal is controlling here because the South Carolina Supreme Court explained – before it extra-contractually modified the agreement in a manner foreclosed by the FAA, see *supra* Part I – that the arbitration agreement did not authorize, but was "silent" as to the issue of class arbitration. Pet. App. 22a.

Similarly, as this Court explained in *Waffle House*, "[i]t goes without saying that a contract cannot bind a nonparty." 534 U.S. at 294. Here, there can be no question that arbitration proceedings at issue in this case were conducted pursuant to arbitration agreements contained in the Bazzles and Lackey Contracts, and that the thousands of other unnamed class members whose claims were resolved were not parties to those contracts. Indeed, as discussed above, general principles of contract law dictate that, absent contractual authorization, the Bazzles and Lackey had no right to enforce the contractual arbitration provisions of third parties. See *Stokes*, 206 F.3d at 429 ("an individual who is not a party to a contract may not enforce it"); *accord Touchberry*, 367 S.E.2d at 150; *Goode*, 494 S.E.2d at 833.

Respondents insist that *Waffle House* is distinguishable because "all the unnamed class members did agree to final and binding arbitration on the same terms as did the class representatives, and *acquiesced to the arbitration*." Resp. Br. 48 (emphasis added). In doing so, Respondents contend that "[t]he unnamed class members' right under the Agreement to withhold their consent to Green Tree's selected arbitrator was

preserved by the right to opt out of the plaintiff classes," *id.* at 36 n.17, and that the rights of these unnamed class members "were carefully preserved" by the arbitrator. *Id.* at 47.

These arguments are wrong for two reasons. First, as to the unnamed class members, Respondents cannot contend that, through silence and inaction, they actually provided the affirmative "consent" that is a prerequisite for an arbitrator to resolve their disputes under the arbitration agreement. Pet. App. 110a (dictating that arbitrator must be "selected by us with consent of you"). Indeed, if the unnamed class members had actually provided consent, there would have been no need to make provision in the arbitral awards for "funds awarded to class members who cannot be located." Pet. App. 79a, 107a.

Second, Respondents disregard the rights of Green Tree, as reflected in the contracts and associated arbitration agreements between Green Tree and each of the individuals who were joined as unnamed class members in the *Bazzle* and *Lackey* arbitrations. Each of these thousands of contracts provided rights not only to these unnamed class members, but also to Green Tree. Thus, Respondents ignore that Green Tree never "acquiesced" to the expansion of the Bazzle and Lackey arbitration agreements to include the claims of thousands of individuals who were not parties to those bilateral contracts. Nor did the arbitrator's opt-out notice "preserve" Green Tree's contractual right – reflected in each of the thousands of agreements – to "select" an arbitrator, "with consent of you," *id.*, in the event that a dispute arose out of that contract.

As a result, to the extent that the arbitrator imposed class arbitration, the arbitral awards must be set aside because the arbitrator plainly "exceeded [his] powers" under an arbitration agreement that does not authorize class arbitration. 9 U.S.C. § 10(a)(4); see also *First Options*, 514 U.S. at 942, 946 (affirming vacatur of arbitrator's decision because arbitrator lacked power over party); *Mastrobuono*, 514 U.S. at 58 (determining whether arbitrator lacked power to award

punitive damages based upon determination of "what the contract has to say").[5] The arbitrator selected by the parties in *Bazzle* and *Lackey* had no authority to bind Green Tree with regard to disputes with thousands of other third parties, and therefore exceeded his powers under the Bazzle and Lackey arbitration agreements.[6]

2. Finally, ensuring that the scope of arbitration remains in accordance with the express terms of the arbitration agreement serves to promote private arbitration and constitutes an essential safeguard expressly incorporated into the FAA. See 9 U.S.C. § 10(a)(4). Respondents ignore the importance of this safeguard when they argue that the scope of arbitration should not be limited by "exclusive reliance on authority spelled out in the contract." Resp. Br. 30. That argument reflects a misunderstanding of private arbitration under the FAA and the parties' agreement to arbitrate.

Under the FAA, parties can choose to "resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943; see also *Volt*, 489 U.S. at 478 ("FAA does not require parties to arbitrate when they have not agreed to do so").

---

[5] *See also Eljer Mfg., Inc.* v. *Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994) ("[t]he test for vacating an award under section 10(a)(4)" is "whether the arbitrator exceeded the powers *delegated to him by the parties*") (emphasis added); Pet. Br. 43 n.15 (collecting circuit court authority).

[6] As Respondents recognize, Green Tree did not submit the issue whether the arbitrator had power to conduct a class-arbitration to the arbitrator for binding resolution. Resp. Br. 44-45 (explaining that Green Tree "never sought" and "does not want" a determination by the arbitrator of whether arbitration agreement authorized class arbitration). Indeed, Green Tree strenuously and continuously objected to class-wide arbitration, R. App. 132-33, 151-52, 156-63, 407-15, 449-50, 1448, 1451, 1455, 1538-39; *see First Options*, 514 U.S. at 946 (explaining that a party does not, by arguing issue regarding arbitrator's power, indicate "a willingness to be effectively bound by the arbitrator's decision"); *Howsam*, 123 S. Ct. at 592 ("a disagreement about whether an arbitration clause . . . applies to a particular type of controversy is for the court").

Section 10(a)(4) simply ensures that an arbitrator will not "exceed [the] powers" delegated by the parties in their private agreement. Adoption of Respondents' approach – whereby an arbitrator could exercise power without regard to the authority delegated under the parties' agreement – would undermine the federal policy in favor of arbitration because private parties would not enter into private agreements to arbitrate if an arbitrator's power over them were unlimited.

Nor would arbitration proceedings "grind to a halt" if an arbitrator could not exercise power never granted by the parties. Here, the arbitrator indisputably had ample "powers" to resolve the statutory issue brought by the Bazzles and Lackey. Pet. App. 110a. Such "powers" necessarily included the ability to dictate procedural matters to resolve "disputes, claims, or controversies arising from or relating to this contract" between "you" and "us." J.A. 33, 35. Nevertheless, this contractual grant of authority is not a license for an arbitrator – through class arbitration, consolidation or any other mechanism – to transform a bilateral arbitration agreement into a multi-lateral proceeding that purports to resolve disputes involving thousands of additional parties who never signed the agreements through which the arbitrator was selected and never "consent[ed]" to the appointment of the arbitrator. Pet. App. 110a; see *Waffle House*, 534 U.S. at 294.

CONCLUSION

For these reasons, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
VIRGINIA M. VANDER JAGT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Petitioner

* Counsel of Record

April 15, 2003

(6)

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT P. FLOYD, III
Counsel of Record
JAMES M. COLEMAN
MAUREEN R. KNIGHT
CONSTANGY, BROOKS & SMITH, LLC
1300 NORTH SEVENTEENTH STREET
SUITE 900
ARLINGTON, VIRGINIA 22209
(703) 527-0900

Counsel for Amicus Curiae

FEBRUARY 24, 2003

23 pp

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. ARBITRATION IS AN EFFECTIVE TOOL FOR THE RESOLUTION OF DISPUTES IN THE EMPLOYMENT SETTING. 3

II. INDIVIDUAL RESOLUTION OF EMPLOYMENT DISPUTES FULLY ACHIEVES THE GOALS BEHIND EMPLOYMENT-RELATED STATUTES. 9

CONCLUSION 16

TABLE OF CITED AUTHORITIES

CASES

Adkins v. Labor Ready, Inc., 185 F. Supp. 2d 628 (S.D.W.V. 2001), *aff'd*, 303 F.3d 496 (4th Cir. 2002) 11, 15

Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) 11

Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002) 14

Carter v. Countrywide Credit Indus., Inc., 189 F. Supp. 2d 606 (N.D. Tex. 2002) 13

Champ v. Siegel Trading Co., 55 F.2d 269 (7th Cir. 1995) 10

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 8-10

General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 12, 15

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9, 10, 12

Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 6

Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654 (S.D.N.Y. 1997) 10

In re Piper Funds, 71 F.3d 298 (8th Cir. 1995) 13

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10, 13

Nicholson v. CPC Int'l Inc., 877 F.2d 221 (3d Cir. 1989) 12

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1 (1st Cir. 1998) 4

Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048 (N.D. Ga. 1986) 13

STATUTES AND LEGISLATIVE AUTHORITY

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* 12, 14

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* 12, 14

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* 12, 14

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) 9

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* 12, 14

Equal Pay Act of 1963, 29 U.S.C. § 206(d) 12

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 216(b) 14

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* 12, 14

TREATISES AND OTHER MATERIALS

American Arbitration Association, 2000 Annual Report ... 7

Discharge Is Now Major Focus of Job Discrimination Suits, Daily Lab. Rep. (BNA) No. 164 (Aug. 23, 1991) 8

Equal Employment Opportunity Commission, *Enforcement Statistics, All Statutes Fiscal Year 1992 - Fiscal Year 2001* (last modified Feb. 6, 2003) <http://www.eeoc.gov/stats/all.html> 7

Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 NO. 1 Disp. Resol. Mag. 23 (1999) 7

Marika F. X. Litras, Ph.D., U.S. Dep't of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, NCJ 173427, Jan. 2000 8

Office of Human Resources and Statistics, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics March 31, 2002* (2002) 8

Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21 (1997) 4

View Resume - [Carolyn Cairns, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=124881> ... 5

View Resume - [Cindy L. Anderson, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=140182> 5

View Resume - [James N. Adler, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=146577> ... 5

View Resume - [Loretta T. Attardo, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=122222> 5

View Resume - [Turna R. Lewis, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=147597> ... 5

View Resume - [William E. Caldwell, Esq.] (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=111153> 5

INTEREST OF THE *AMICUS CURIAE*

The National Council of Chain Restaurants (hereinafter the "Council")[1] is a national trade industry group representing the interests of forty of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these forty companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the Council's member companies and their franchisees employ in excess of three million individuals in all fifty states.

Many of the Council's member companies utilize arbitration agreements with their employees to effectuate the resolution of disputes arising out of the employment relationship in an arbitral rather than judicial forum. The benefits of arbitration are many and well-known, and the member companies that enter these agreements have found them to be highly effective at reducing costs for both parties, significantly decreasing the amount of time it takes to reach a resolution, and ultimately improving the lines of communication between employee and employer. However, for the reasons discussed in this brief, these impressive results would be undermined if this Court were to affirm the holding of the Supreme Court of South Carolina in the case before it.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. The written consents of the parties to the filing of this brief have been filed with the clerk.

SUMMARY OF ARGUMENT

The Council is confident that Petitioner, and the other *amici* supporting Petitioner, will persuasively argue for the adoption of the view taken by the majority of courts that courts and arbitrators may not proceed with class treatment of a dispute covered by an arbitration agreement that is silent as to, or affirmatively waives, such class treatment. The Council would like to emphasize, however, the importance, popularity, and effectiveness of arbitration agreements in the employment setting, and respond to Respondents' arguments in favor of class treatment, from the employment perspective.

1. Both employees and employers benefit greatly from the use of arbitration agreements. In addition to the advantages of arbitration which are generally applicable to all settings, such as reduced costs and increased speed of resolution, the Council will describe how workplaces have benefitted from arbitration rules tailored to the employment setting and decision-makers with expertise in the field of employment law. Moreover, the Council will explain how employers utilizing arbitration agreements have received an additional benefit from their use of these agreements -- improved relationships and communications with their employees. Because the use of arbitration agreements in the employment relationship is nearly always coupled with a progressive and multi-faceted internal grievance resolution procedure, concerns are being raised and *resolved* earlier, most often before the formal arbitration stage. Both employees and employers benefit from this improved avenue for communication.

2. Respondents' arguments in favor of forcing class treatment upon parties who did not expressly contract for the same are particularly inapplicable in the employment

setting. Class actions are a procedural device, not a substantive right. To allow procedural devices to trump the substantive rights afforded by the contract language itself, and by the statutory language of the Federal Arbitration Act, is to skew the very essence of American jurisprudence. This brief will challenge the argument of the minority view that absolute guarantee of class treatment is necessary to protect the claims of individuals that may be too small to pursue individually. Employment law statutes almost universally provide for compensation for intangible damages, punitive damages, and/or liquidated damages, any of which could be substantial. Moreover, these statutes provide for attorneys' fees for prevailing plaintiffs, and, therefore, counsel should not be dissuaded from assisting clients with such claims.

The Council urges this Court to continue to rebuke hostility towards arbitration by reversing the decision below, thereby ensuring that this valuable tool in the employment setting is not jeopardized.

ARGUMENT

I. ARBITRATION IS AN EFFECTIVE TOOL FOR THE RESOLUTION OF DISPUTES IN THE EMPLOYMENT SETTING.

The virtues of arbitration are abundant. In addition to the oft-cited reduced costs and quicker resolution associated with arbitrated claims as compared to litigated cases, an agreement to arbitrate can be tailored to meet the specific needs of the types of disputes the parties are likely to encounter. The same cannot be said of civil litigation, in which the same rules and procedures apply to virtually all cases, regardless of the nature of the dispute.

Highlighting this significant difference, the American Arbitration Association, the nation's preeminent organization of arbitrators, has no less than nine separate and unique sets of rules and supplementary rules for arbitration of disputes arising in different settings. These focus areas include commercial (which includes separate due process protocols for the health care industry and for consumer-related disputes, as well as supplementary procedures for consumer-related disputes, for intra-industry U.S. insurance and reinsurance, and for securities), construction, employment, uninsured motorist accidents, international, and labor. These specialized rules and protocols are designed to specifically address the unique characteristics of disputes in each field.

An additional advantage to arbitration also significant in the employment setting is the expertise of the decision-makers. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 8 n.4 (1st Cir. 1998) (". . . arbitration may also allow parties to select arbitrators with expertise in the subject matter of the dispute."), citing Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21, 33 (1997). The employment law arbitrators sanctioned by the American Arbitration Association have particular expertise in employment law. Their venerable positions have included professor of employment law, special assistant to the Solicitor of Labor, in-house labor counsel, administrative judge/hearing examiner for the Equal Employment Opportunity Commission, attorney for the Department of Labor Benefits Review Board, senior trial judge with the Equal Employment Opportunity Commission, and litigation attorney with the National Labor Relations Board, to

name just a few.[2] Employment law arbitrators have dedicated their careers to the practice of labor and employment law, representing both plaintiffs and defendants. With the complex and fact-intensive issues that often arise in employment claims, this level of expertise is invaluable and often times far superior to the employment law knowledge possessed by judges or juries.

In the employment setting, arbitration has been successful on so many levels because it is not simply a choice-of-forum for the final resolution of a dispute, but is often one component of an overall culture of progressive and flexible resolution. This culture fosters improved communications between employees and management and enables employers to be pro-active rather than reactive to the concerns of its workforce. For instance, most arbitration agreements in the employment setting require that an employee first raise his or her concern with a manager or human resources official. Because so many employment disputes are based on misunderstandings, this required step often heads off disputes before they start. Indeed, the arbitration agreements of the Council's member companies often include several steps for internal grievance resolution (including, for example, open

---

[2] *See, View Resume - [James N. Adler, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=146577>; *View Resume - [Cindy L. Anderson, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=140182>; *View Resume - [Loretta T. Attardo, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=122222>; *View Resume - [Carolyn Cairns, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=124881>; *View Resume - [William E. Caldwell, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=111153>; and *View Resume - [Turna R. Lewis, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=147597>.

door policies, peer reviews, and internal mediation), thereby increasing the likelihood that a resolution will be reached without the need for outside mediation or arbitration.

This progressive grievance system is commonly used in the employment setting. This system is significant not only because it reduces the number of claims that ultimately result in arbitration, but also because it offers the employer valuable feedback from its employees who have concerns. This feedback allows employers to continually improve the working environment and ensure fair treatment to all of its employees. In addition, progressive grievance systems, and arbitration itself, allow for the resolution of disputes while maintaining the employment relationship. *See Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) ("... the adversarial nature of litigation diminishes the possibility that the parties will be able to salvage their relationship.").

In addition, grievance procedures provide employees with an invaluable opportunity to fully voice their complaints. Too often in litigation, litigants (particularly employees) are left feeling as if they were never able to "tell their side of the story" because of the restrictive procedural rules. Because an individual's employment relationship is often the second-most important relationship in his life behind his family, the inability to thoroughly air a grievance when this relationship becomes strained can be crushing. Internal grievance procedures, and the arbitration process itself, encourage open communication between the parties, offering a level of satisfaction often lacking in litigation.

To further highlight the mutuality of the benefits of arbitration to both employers and employees, it is important to note the success-rate employees enjoy in arbitration. During the years 1993 through 1995, employees won 63 percent of

their cases before arbitrators with the American Arbitration Association, compared to only 15 percent of employees who pursued their claims in federal court in 1994.[3] Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 NO. 1 Disp. Resol. Mag. 23, 23 (1999). Much of this disparity is due to the fact that the majority of employment cases before a court are resolved by summary judgment, in which employers prevail an incredible 98 percent of the time. *Id.* at 23-24. However, summary judgment is nearly non-existent in arbitration. *Id.*

Given the success of arbitration agreements in the employment setting, the speed with which their use is growing is not surprising. In 2000, more than 500 employers, employing more than 5 million employees, used the services of the American Arbitration Association to resolve employment disputes. *See* American Arbitration Association, 2000 Annual Report, at 30. The Association informs the Council that those numbers have now risen to 800 employment arbitration programs, covering approximately 7 million employees.

These increasing numbers are particularly important given that employment-related litigation has increased by an astonishing rate throughout the last three decades and currently represents a significant portion of the federal judicial caseload.

---

[3] These arbitration success-rates are also significantly higher than the success-rates of charging parties before the Equal Employment Opportunity Commission, who during those three years issued no probable cause determinations in approximately 52 percent of its charges and characterized less than 15 percent of its charges as "merit resolutions," meaning a resolution that involved a finding of probable cause, a settlement, or a withdrawal with benefits. Equal Employment Opportunity Commission, *Enforcement Statistics, All Statutes Fiscal Year 1992 - Fiscal Year 2001* (last modified Feb. 6, 2003) <http://www.eeoc.gov/stats/all.html>.

In 2002, employment litigation represented nearly fourteen percent of the more than one-quarter million cases filed in United States District Courts. Office of Human Resources and Statistics, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics March 31, 2002*, at 44-46 (2002). But for the increasing use of arbitration agreements in the last several years and the resolution of disputes through internal grievance procedures, would these numbers be higher? Very likely.

In the two decades between 1971 and 1991, employment law cases saw a staggering 400 percent increase in the federal district courts. *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991). Between 1990 and 1998, the number of employment civil rights claims increased by an additional 300 percent. Marika F. X. Litras, Ph.D., U.S. Dep't of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, NCJ 173427, Jan. 2000, at 2. Interestingly, however, the number of these claims decreased by more than ten percent between 1998 and 2001 (and the number dropped still lower in 2002)[4] – the very same period in which arbitration usage has increased.

This Court has recognized the appropriateness of arbitration agreements in the employment setting. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). The Court

---

[4] *Federal Judicial Caseload Statistics March 31, 2002* at 45 (21,152 employment civil rights claims in 2001 and 21,117 in 2002) and Litras at 2 (23,735 employment civil rights claims in 1998).

went on to note that ". . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.*, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991). Indeed, arbitration is mentioned favorably in the very language of the Civil Rights Act of 1999. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (". . . the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title.").

Despite arbitration's overwhelming judicial and congressional support in theory and its monumental success in practice, some courts continue to exhibit the very hostility and suspicion towards arbitration that this Court has for decades been demanding they not display. This case offers another opportunity for this Court to rebuke such hostility and suspicion, reenforce its support of arbitration, and encourage a judicial environment in which employers will continue to utilize this mutually-beneficial resolution tool.

II. INDIVIDUAL RESOLUTION OF EMPLOYMENT DISPUTES FULLY ACHIEVES THE GOALS BEHIND EMPLOYMENT-RELATED STATUTES.

This Court has insisted that the statutory protections afforded employees can be realized through the use of arbitration.

> The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the

> policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'"

Circuit City, 532 U.S. at 123, citing *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Council moves, then, to the analysis of whether these same protections are jeopardized by individual, rather than class, treatment of claims. The Council urges this Court to adopt the position of the majority of courts and hold that they are not.

As Petitioner and other *amici* undoubtedly will point out, the overwhelming majority of courts that have addressed the issue have decided that an arbitration agreement that (through silence or affirmative waiver) eliminates the ability to proceed as a class is not thereby rendered unenforceable. The Council will focus, therefore, on the cases addressing arbitration agreements in the employment context. *See, e.g., Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (". . . a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration."), citing *Champ v. Siegel Trading Co.*, 55 F.2d 269, 276-77 (7th Cir. 1995).

Courts analyzing the enforceability of employment arbitration agreements have been persuaded by the treatment of the class action issue in other settings, such as claims under the

Truth in Lending Act (TILA). In determining "whether the inability of parties to bring a class action in arbitration proceedings renders invalid the arbitration clause," the Southern District of West Virginia relied on the "well-reasoned" opinion of the Third Circuit in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). *See Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 645 (S.D.W.V. 2001) ("*Adkins I*"), *aff'd*, 303 F.3d 496 (4th Cir. 2002) ("*Adkins II*").

In *Johnson*, the Third Circuit held that even if the TILA and the Electronic Fund Transfer Act implied a right to proceed as a member of a class, "rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means." *Johnson*, 225 F.3d at 373. In *Adkins I*, the District Court applied this same reasoning to a case involving the Fair Labor Standards Act (FLSA), which provides for collective actions on an opt-in basis. "There is no language in the FLSA which expressly prohibits an individual from contractually waiving his right to assert FLSA claims via a class action mechanism." *Adkins I*, 185 F. Supp. 2d at 646. In affirming the District Court, the Fourth Circuit utilized this same standard for resolving the issue:

> [Plaintiff] points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. His inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum.

Adkins II, 303 F.3d at 503.

Applying this same standard for discerning congressional intent regarding the waivability of a right to a class action, we reach the same result when analyzing the other major employment statutes as the Fourth Circuit reached regarding the FLSA.[5] Nothing in the text, legislative history, or purposes of these statutes confers a nonwaivable right to bring claims under the statute on a class basis. Indeed, with the exception of the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act, both of which cross-reference or utilize the enforcement procedures of the FLSA, these statutes do not speak to class treatment by private parties at all. *See, e.g., General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) ("Title VII . . . contains no special authorization for class suits maintained by private parties.").

Most persuasive as to this issue is this Court's own language in *Gilmer v. Interstate/Johnson Lane Corporation*, rejecting the plaintiff's argument that arbitration of a claim under the ADEA should not be compelled because the arbitration agreement did not provide for class actions. This Court reasoned that ". . . 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Gilmer*, 500 U.S. at 32, quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting).

---

[5] *See* Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e, *et seq.*; Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. 12101, *et seq.*; Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 U.S.C. 621, *et seq.*; Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001, *et seq.*; Equal Pay Act of 1963, 29 U.S.C. § 206(d); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601, *et seq.*

The class action is nothing more than a procedural device. It is not a substantive right, and allowing it to trump the substantive rights of parties to arbitration agreements that are afforded by contract law and by the Federal Arbitration Act is entirely unjustified. One court has eloquently explained

> Rule 23 is a procedural device provided by Congress to allow the court discretion in applying class action status to plaintiffs and those other class members similarly situated. The right to arbitration is contractual and therefore substantive. Congress did not intend that procedural class action certification be used to abrogate the contractual rights employed in the execution of the arbitration agreements . . .

Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048, 1065 (N.D. Ga. 1986). *See also In re Piper Funds*, 71 F.3d 298, 302-03 (8th Cir. 1995) (holding that a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management"); *Carter v. Countrywide Credit Indus., Inc.*, 189 F. Supp. 2d 606, 618-19 (N.D. Tex. 2002) (enforcing an arbitration agreement that precluded employees from pursuing FLSA claims collectively, noting *Gilmer*'s holding "that the inability to proceed as a class action and the limitations on discovery were not substantive rights that prevented arbitration of the claims").

This Court has acknowledged that procedural rights provided by a judicial forum may be sacrificed in exchange for the many benefits of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (by agreeing to arbitrate a statutory claim, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"). The

ability to bring a class action is one of "the procedures . . . of the courtroom" that a party trades when it becomes a party to an arbitration agreement that does not expressly allow for class treatment.

The South Carolina Supreme Court concluded that "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 (S.C. 2002). But this justification for implying a right to bring a class action in arbitration misses the mark. First, a party's damages do not change depending on whether he pursues his claim on an individual or class basis. His rights to relief will be the same either way.[6] In the employment setting, moreover, intangible damages (such as pain and suffering), punitive damages, or liquidated damages often are available, offering the prospect of significant monetary claims. Therefore, few claims in the employment setting are so insignificant as to make individual pursuit so unlikely that an individual remedy is the equivalent of "no avenue for relief."

Second, all of the relevant employment statutes provide for attorneys' fees for prevailing parties.[7] Such provisions

---

[6] Compare, also, Title III of the Americans with Disabilities Act, which provides for no monetary relief whatsoever to plaintiffs who bring suit under the Act for barriers to accessability to public accommodations. Plaintiffs in these cases have apparently not felt they had "no avenue for relief" based on this fact, given that thousands of suits under Title III have been filed by individual plaintiffs since its enactment in 1990.

[7] *See* 29 U.S.C. § 216(b); 42 U.S.C. § 2000e-5(k); 42 U.S.C. 12205; 29 U.S.C. 626(b), cross-referencing 29 U.S.C. 216(b); 29 U.S.C. § 1132(g); 29 U.S.C. § 2617(a)(3).

ensure the ability to retain an attorney to assist with the pursuit of a claim under any such statute. Furthermore, claims potentially affecting more than one individual would be that much more attractive to an attorney. Even if claims cannot be pursued on a class basis, the attorney nevertheless would have multiple claims with similar issues, thereby reaping the benefits of prior research, analysis, and drafting. In addressing this point in an FLSA case, a District Court noted,

> While legal representation for individual claims with small amounts at stake in the arbitral forum may lack the vigor of legal representation for large class actions proceeding in a judicial forum, attorneys should nevertheless not be dissuaded from bringing individual FLSA claims of a small monetary value within the arbitration forum, particularly when, as here, there are a large number of related cases.

Adkins I, 185 F. Supp. 2d at 646.

If we are concerned that the individual claim is somehow less alluring to attorneys because they prefer to be involved in high-stakes class arbitration, then we must ask ourselves who we are trying to appease by forcing class arbitration on parties to an agreement when the arbitration agreement does not provide for class treatment: Congress, which drafted the respective statutes under which these claims are being brought, or attorneys?

The purpose of class actions is judicial economy. *General Tel. Co. of Southwest*, 457 U.S. at 161 (1982) (Burger, C.J., concurring). Arbitration of claims is the ultimate in judicial economy because it removes cases from the over-crowded court system. With employment litigation

representing fourteen percent of the judicial caseload, and employment-litigation increasing by as much as 600 percent in the last three decades, any tool that is able to reduce the number of prospective employment cases filed in federal courts should be applauded and encouraged. The Council believes Congress and this Court have done both.

However, if the Court were to accept the minority view on this issue and hold that arbitration may proceed on a class basis absent contract language providing for such class treatment, as articulately argued by fellow *amicus* the Chamber of Commerce of the United States, arbitration as it now exists will be jeopardized. Employers will either radically formalize their arbitration agreements to provide significant procedural protections (thereby eradicating the primary purpose of arbitration agreement: simplicity and informality) or they will simply forgo arbitration altogether. If class arbitration is forced on parties, too much would be at stake to utilize the informal procedures of the current and advantageous arbitration structure.

The Council urges the Court to hold parties to the bargained-for provisions of the agreement as written, so that this highly effective dispute-resolution tool of arbitration can continue to provide significant benefits to employers and employees alike. Arbitration in the employment setting is building speed, and, absent discouraging case law, it will undoubtedly have significant positive effects, not only on the judicial caseload, but on the very culture of the working environment.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

ROBERT P. FLOYD, III
Counsel of Record
JAMES M. COLEMAN
MAUREEN R. KNIGHT
CONSTANGY, BROOKS & SMITH, LLC
1300 NORTH SEVENTEENTH STREET
SUITE 900
ARLINGTON, VIRGINIA 22209
(703) 527-0900

Counsel for Amicus Curiae

FEBRUARY 24, 2003

(7)

Supreme Court, U.S.
FILED
FEB 24 2003
CLERK

No. 02-634

IN THE

SUPREME COURT OF THE UNITED STATES

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE and BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS and FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

BRIEF OF NEW ENGLAND LEGAL FOUNDATION AND CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS AS *AMICI CURIÆ* IN SUPPORT OF PETITIONER ON THE MERITS

MICHAEL E. MALAMUT
CHRISTINE HUGHES
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660

CHRISTOPHER M. MASON*
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022
(212) 940-3000

J. VANN VOGEL
JEROME KARNICK
VERIZON WIRELESS
180 Washington Valley Road
Bedminster, New Jersey 07921
(908) 306-7300

DAVID H. GIBBS
JOHN R. PAGLIARO
NIXON PEABODY LLP
101 Federal Street
Boston, Massachusetts 02110
(617) 345-1000

Counsel for New England Legal Foundation and Cellco Partnership d/b/a/Verizon Wireless as Amici Curiæ

February 24, 2003

*Counsel of Record

38 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIÆ* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. **The South Carolina Supreme Court's decision conflicts with the federal policy of the FAA and this Court's settled arbitration jurisprudence** 5

A. *The South Carolina Supreme Court's decision conflicts with the uniform federal policy of the FAA that arbitration agreements be enforced according their terms* 6

B. *The South Carolina Supreme Court's decision conflicts with this Court's settled arbitration jurisprudence* 12

II. **The South Carolina Supreme Court incorrectly treated access to class action procedures as a fundamental right** 18

CONCLUSION 26

TABLE OF AUTHORITIES

Cases Page

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 14

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 19

America Dredging Co. v Miller, 510 U.S. 443 (1994) ..... 22 n. 25

America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001) ..... 20 n. 22

America OnLine, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699 (Ct. App. 2001) ..... 20 n. 22

Arkoosh v. Dean Witter & Co., 415 F. Supp. 535 (D. Neb. 1976) ..... 23-24 n. 28

AT&T Corp. v Iowa Utils. Bd., 525 U.S. 366 (1999) 18

Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002), *cert. granted sub nom. Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 817 (2003) ..... 4, 5, 7 n. 5, 11, 12 n. 13, 19, 22, 24 n. 29

Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198 (1956) 8

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) ..... 23 n. 26

Brower v. Gateway 2000, Inc.,
676 N.Y.S.2d 569 (N.Y. App. Div. 1998) ..... 3 n. 2, 13 n. 15

Byrd v. Blue Ridge Rural Elec. Coop., Inc.,
356 U.S. 525 (1958) ..... 5-6, 6 n. 3

Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.,
826 P.2d 710 (Cal. 1992) ..... 15 n. 18

Carnival Cruise Lines v. Shute,
499 U.S. 585 (1991) ..... 20, 21-22 n. 23

Celmins v. America OnLine,
748 So. 2d 1041 (Fla. Dist. Ct. App. 1999) ..... 20 n. 22

Champ v. Siegel Trading Co.,
55 F.3d 269 (7th Cir. 1995) ..... 7 n. 5, 12 n. 13

Circuit City Stores, Inc. v. Adams,
532 U. S. 105 (2001) ..... 14 & n. 16

City of San Jose v. Superior Court
525 P.2d 701 (Cal. 1974) 21

Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal., 508 U.S. 602 (1993) 18

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S 193 (2000) ..... 7 n. 4, 21 n. 24

Cummings v. Missouri,
71 U.S. (4 Wall.) 277 (1867) ..... 10 n. 10

Davis v. Prudential Secs., Inc.,
59 F.3d 1186 (11th Cir. 1995) ..... 23 n. 26

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) ..... 12, 16 n. 19

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) 19

Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148 (5th Cir. 1992), *cert. denied sub nom. Dillard v. Security Pac. Corp.*, 506 U. S. 1079 (1993) 23

Discover Bank v. Superior Court,
129 Cal. Rptr. 2d 393 (Ct. App. 2003) ..... 15 n. 18, 20 n. 22

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) ..... 8-9, 9 n. 7

Eastman v. Burleigh,
2 N.H. 484 (1822) ..... 15 n. 17

Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002) 8

Fairbank v. United States,
181 U.S. 283 (1901) ..... 10 n. 10

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) ..... 16 n. 19

Forrest v. Verizon Communications, Inc.,
805 A.2d 1007 (D.C. 2002) ..... 20 n. 22

Frank Fiore Enters., Inc. v. Francis,
No. 86 Civ. 7241 (WCC),
1987 U.S. Dist. LEXIS 2711
(S.D.N.Y. Apr. 8, 1987) 12

Frazar v. Gilbert,
300 F.3d 530 (5th Cir. 2002) 19

Giles v. City of New York,
41 F. Supp. 2d 308 (S.D.N.Y. 1999) ..... 16 n. 19

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... 17, 22 n. 26, 25

Government of the U.K. of Gr. Br. & N. Ir. v. Boeing Co.,
998 F.2d 68 (2d Cir. 1993) ..... 13 n. 15

Great Western Mortg. Corp. v. Peacock, 110 F.3d 222 (3rd Cir.), *cert denied sub nom. Peacock v. Great Western Mortg. Corp.*, 522 U. S. 915 (1997) ..... 23 n. 28

Groff v. America OnLine, Inc.,
No. PC 97-0331, 1998 R.I. Super. LEXIS 46 (Super. Ct. R.I. May 27, 1998) ..... 20 n. 22

Hanson v. Denkla,
357 U.S. 235 (1958) ..... 17 n. 20

Harris v. Shearson Hayden Stone,
441 N.Y.S.2d 70 (N.Y. App. Div. 1981), *aff'd on op. below*, 435 N. E .2d 1097 (N.Y. 1982) ..... 3 n. 2, 13 n. 15, 22 n. 25

Howsam v. Dean Witter Reynolds, Inc.,
123 S. Ct. 588 (2002) 10

In re Garcelon,
88 P. 414 (Cal. 1894) ..... 15 n. 18

Jacob v. New York,
315 U. S. 752 (1942) 23

Johnson v. West Suburban Bank,
225 F. 3d 366 (3rd Cir. 2000), *cert. denied*, 531 U. S. 1145 (2001) ..... 24 n. 29

Keating v. Superior Court,
645 P. 2d 1192 (Cal. 1982), *rev'd in part sub nom. Southerland Corp. v. Keating*, 465 U.S. 1 (1984) 9

K.M.C. Co. v. Irving Trust Co.,
757 F. 2d 752 (5th Cir. 1985) 23

Koch v. America OnLine,
139 F. Supp. 2d. 690 (D. Md. 2000) ..... 20 n. 22

Leasing Serv. Corp. v. Crane,
804 F.2d 828 (4th Cir. 1986) ..... 23 n. 27

Leddy v. Standard Drywall, Inc.,
875 F.2d 383 (2d Cir. 1989) ..... 16 n. 19

Lividas v. Bradshaw,
512 U.S. 107 (1994) ..... 19 n. 21

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) ..... 3, 7, 12 n. 13

McDonald v. City of West Branch,
466 U.S. 284 (1984) ..... 16 n. 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 16-17

Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983) .... 2-3, 8, 9, 13 n. 15, 25

Perry v. Thomas,
482 U.S. 483 (1987) ..... 9, 10 & n. 10, 11

Precision Etchings & Findings, Inc. v. LGP Gem, Ltd., 953 F.2d 21 (1st Cir. 1992) ..... 18 n. 20

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) ..... 3 n. 2

Printing Numerical Registering Co. v. Sampson, L.R. 19 Eq. 465 (Mar. 9, 1875) ..... 15 n. 18

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 17, 25

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) ..... 11 n. 11

Sanders v. Gardner, 7 F. Supp. 2d 151 (E.D.N.Y. 1998) ..... 23 n. 26

Sawtelle v. Waddell & Reed, Inc., No. 2330, 2003 N.Y. App. Div. LEXIS 1243 (Feb. 11, 2003) ..... 22-23 n. 26

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 21

Shearson/American Express v. McMahon, 482 U.S. 220 (1987) ..... 21 n. 24

Sosna v. Iowa, 419 U.S. 393 (1975) ..... 24 n. 28

Southland Corp. v. Keating, 465 U.S. 1 (1984) ..... 3, 4, 7, 8 n. 6, 10

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) ..... 16 n. 19

Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 98 (W.D. La. 1985) ..... 13 n. 15

Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988), *cert. denied*, 490 U.S. 1021 (1989) ..... 23 n. 27

Ting v. AT&T, No. 02-15416, 2003 U.S. App. LEXIS 2395 (9th Cir. Feb. 11, 2003) ..... 15 n. 18, 22 n. 25

Transaero, Inc. v. Feurza Aearea Boliviana, 162 F.3d 724 (2d Cir. 1998), *cert. denied*, 526 U.S. 1146 (1999) ..... 17 n. 20

Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1991) ..... 16 n. 19

Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999) ..... 16 n. 19

Vernon v. Drexel Burnham & Co., 125 Cal. Rptr. 147 (Ct. App. 1975) ... 15 n. 18, 22 n. 25

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) ..... 21 n. 24

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) ..... *passim*

Washington Mut. Bank v. Superior Court, 15 P.3d 1071 (Cal. 2001) 21

Weyerhauser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984) ..... 21 n. 24

Constitutions, Statutes, and Rules

U.S. Const. art. VI ..... 4, 7 n. 5

U.S. Const. amend VII 23
U.S. Const. amend XIV ..... 22 n. 26
9 U.S.C. §§ 1-16 (2000) ..... *passim*
9 U.S.C. § 2 (2000) ..... 3, 5, 6, 8 & n. 6, 10, 25
9 U.S.C. § 3 (2000) ..... 3, 6, 8 & n. 6
9 U.S.C. § 4 (2000) ..... 3, 6-7, 8 & n. 6
29 U.S.C. §§ 151 *et seq.* (2000) ..... 19 n. 21
29 U.S.C. § 1401 (2000) 18
46 U.S.C. § 183c (2002) ..... 21 n. 23
47 U.S.C. § 252 (2000) 18
43 Stat. 883, ch. 213 (1925) 3, 8
96 Pub. L. 364, 94 Stat. 1208 18
Fed. R. Civ. P. 23 5
S. C. R. Civ. P. 23 5

Legislative History

Hearing on S. 4213 and S. 4214, Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess., (1923) (statement of Charles L. Bernheimer) ..... 3 n. 2
H. R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 9
H. R. 2084, 80th Cong., 1st Sess. (1947) 8

Secondary Sources

Geoffrey C. Hazard, Jr. *et al.* *An Historical Analysis of the Binding Effect of Class Suits,* 146 U. Pa. L. Rev. 1849 (1998) 24
12 William Holdsworth, *A History of English Law* (1964) ..... 15 n. 17
14 William Holdsworth, *A History of English Law* (1964) ..... 9 n. 8
Stewart Kyd, *A Treatise on the Laws of Awards* (1791) ..... 15 n. 17
7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1986) 24
9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1995) 23

New England Legal Foundation ("NELF") and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") submit this brief *amici curiæ* in support of Petitioner Green Tree Financial Corp. a/k/a Green Tree Acceptance Corp. a/k/a Green Tree Financial Services Corp. a/k/a Conseco Finance Corp. ("Green Tree") and in favor of reversal of the decision of the South Carolina Supreme Court imposing class action procedures in arbitrations by parties who did not agree to any such procedures in their arbitration agreements.[1] The decision below ignores the express language and long-standing federal policy of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) (the "FAA"), that arbitration agreements shall be enforced according to their terms. It also ignores this Court's settled arbitration jurisprudence and improperly seeks to make access to class action procedures a fundamental right. It does all of this in an attempt to justify a newly-created judicial rule, based on individual state court notions of "equity and efficiency", that would require class-wide arbitrations without the agreement of the parties involved.

STATEMENT OF INTEREST OF *AMICI CURIÆ*

NELF is a non-profit, public interest law firm. Its more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States as well as private law firms, individuals, and others who believe in promoting balanced

---

[1] Pursuant to Supreme Court Rule 37.6, NELF and Verizon Wireless state that this brief was prepared entirely by them and their counsel. No one other than them and their members made any monetary contribution toward the preparation or submission of this brief.

economic growth, protecting the free enterprise system, and defending economic rights. NELF frequently acts as an *amicus curiae* in cases raising policy and constitutional concerns related to these issues. Most of NELF's members are engaged in interstate commerce. Many of them regularly use contracts containing arbitration clauses.

Verizon Wireless is a joint venture indirectly owned by Verizon Communications, Inc., a domestic telecommunications holding company, and Vodafone Group plc, a British telecommunications company. Verizon Wireless, the largest wireless telecommunications provider in the United States, has over 30,000,000 customers. It uses arbitration clauses extensively in its contracts with its customers and others.

SUMMARY OF ARGUMENT

This Court should reverse the decision below. The FAA, to ensure a uniform national approach to arbitration agreements involving interstate commerce, requires that such agreements be enforced according to their terms. Indeed, this is its "primary purpose." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). This federal statutory policy therefore supersedes any state notions of "efficiency and equity" that would supposedly permit a state court to impose modern class action procedures taken from its judicial system (and incorrectly assumed to be somehow a fundamental right) on parties whose private arbitration agreements contain no such terms.

ARGUMENT

The FAA is intended to "create a body of federal substantive law of arbitrability, applicable to any arbitration

agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *see also, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) ("the substantive law the Act created" applies in both "state and federal courts.").The decision below would improperly frustrate this goal by using varying, state-by-state interpretations of "efficiency and equity" to allow state courts to replace the FAA's substantive preference for enforcement of arbitration agreements according to their terms with a preference for class-wide arbitration procedures instead.

At the time of the FAA's original enactment (as the United States Arbitration Act, 43 Stat. 883, ch. 213 (1925)), federal substantive law certainly did not contemplate the modern class action, much less class-wide arbitrations.[2] That law did—and still does—however, require that arbitration agreements, if not revoked on grounds generally applicable to all contracts, be enforced according to their terms. *E.g.*, 9 U.S.C. §§ 2, 3, 4; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995); *Volt*, 489 U.S. at 479; *Southland*, 465 U.S. at 16. The court below ignored this unwavering federal policy with reasoning openly hostile to the arbitration

---

[2] *See, e.g.*, Hearing on S. 4213 and S. 4214, Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (comments of Charles L. Bernheimer that the proposed legislation "follows the line of the New York arbitration law"), *cited in Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967)). Notably, New York state courts have never adopted any theory of class-wide arbitration for arbitrations in that state. *See, e.g., Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998); *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 76 (N.Y. App. Div. 1981), *aff'd on op. below*, 435 N.E.2d 1097 (N.Y. 1982).

clauses in millions of existing form contracts subject to the FAA:

> class-wide arbitration may be ordered when the arbitration agreement is silent if it would *serve efficiency and equity*, and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not *serve the interest of judicial economy*.

Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360-61 (S.C. 2002) (footnotes omitted) (emphasis added), *cert. granted*, 123 S. Ct. 817 (2003).

The vague and open-ended standards proposed in this reasoning will destroy the desired uniformity of federal law under the FAA while improperly attempting to raise the mere procedural device of the class action to the level of a fundamental right greater than that of trial by jury. They will also—as they did below—produce results inconsistent with the substantive language of the FAA (and, consequently, contrary to the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2) and

inconsistent with Court's settled arbitration jurisprudence. As a result, this Court should reverse the decision below.

I. The South Carolina Supreme Court's decision conflicts with the federal policy of the FAA and this Court's settled arbitration jurisprudence.

Class actions are based on court rules developed for judicial fora. *See, e.g.*, Fed. R. Civ. P. 23; S. C. R. Civ. P. 23. Arbitrations are based on private agreements. *See* 9 U.S.C. § 2. While an arbitration agreement may incorporate the rules developed for a particular arbitral forum, the court below identified no arbitral forum that requires class-wide arbitration, much less class-wide arbitration over the objection of a party. Nor did the court below identify any such arbitral forum chosen by the parties here. Instead, to avoid a "risk" that parties may be treated differently in arbitration than in court, and to serve an alleged policy of "efficiency and equity", it sought to impose a presumption of class-wide procedures as part of every arbitration agreement in every arbitral forum. *See Bazzle*, 569 S.E.2d at 361.

As discussed below, the South Carolina Supreme Court improperly ignored the uniform federal policy of the FAA favoring enforcement of arbitration agreements according to their terms. It also improperly attempted to justify this failure by inflating the importance of its own judicial policy. Federal policy on how to decide issues of fact in a federal court will not yield to state procedural rules merely "in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*,

356 U.S. 525, 538 (1958). Similarly, a uniform federal policy on how to enforce arbitration agreements should not yield to a state court's notions of "efficiency and equity" so as to avoid a "risk" that a matter would be handled one way in that state's courts and another way in arbitration.[3]

A. The South Carolina Supreme Court's decision conflicts with the uniform federal policy of the FAA that arbitration agreements be enforced according their terms.

In reaching its decision, the court below honored neither the precise words nor the general intent of the FAA. The FAA permits a court only to determine whether there is a valid agreement to arbitrate and, if so, to take actions that honor the terms of that agreement. Section 2 provides that a written arbitration clause involving interstate commerce "*shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). Section 3 provides that if a lawsuit involves an issue covered by such an arbitration clause, the court "*shall* upon application of one of the parties stay the trial of the action until such arbitration has been had *in accordance with the terms of the agreement* . . . ." 9 U.S.C. § 3 (emphasis added). Section 4 provides that if a court tries the issue of the existence of an arbitration agreement and finds that one exists, it "*shall* make an order directing the parties to proceed to arbitration

[3] As in *Byrd*, 356 U.S. at 539-40, any assumption that actual outcomes would be different because of a particular South Carolina rule (in this case imposing an obligation to make available class-wide procedures in contracts containing arbitration clauses) is not supported by any evidence.

in accordance with the terms of the arbitration agreement." 9 U.S.C. § 4 (emphasis added).[4]

These sections neither authorize a court to rewrite an arbitration agreement (as opposed to revoke it) an arbitration clause nor authorize it to order that an arbitration proceed in accordance with its individual judicial views of "efficiency and equity" (as opposed to the terms of the arbitration clause). Yet these were effectively the steps taken by the court below—even though *this* Court has also long held that "private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added); *accord, e.g., Mastrobuono*, 514 U.S. at 54 (same); *Southland*, 465 U.S. at 13 ("the purpose of the" FAA was to "assure" parties that their "expectations would not be undermined by . . . state courts or legislatures.").[5]

The importance of the policy choice by Congress that arbitration clauses be enforced as written is clear. First, the language of the FAA requiring enforcement of arbitration

[4] Notably, these Sections use the word "shall", not "may." *Cf. Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198-99 (2000) ("may" can, but does not necessarily, imply some degree of discretion as used in parts of the FAA).

[5] As others will undoubtedly point out, federal courts following this Court's jurisprudence have generally refused as a matter of federal law to impose class action procedures on private arbitrations that do not provide for them. *See, e.g., Champ v. Siegel Trading Co.*, 55 F. 3d 269, 276 (7th Cir. 1995). The court below did not deny that it was refusing to follow federal law and these decisions. Its purported justification for this refusal (without any mention of the Supremacy Clause, U.S. Const. art. VI, § 2), and for its preference instead for California state law, was simply that "[f]ollowing the federal approach risks" results it considered unpalatable as a matter of "equity." *Bazzle*, 569 S.E.2d at 361.

clauses "in accordance with the terms of the agreement" (except when subject to "revocation") has remained untouched since its enactment in 1925. *Compare* 43 Stat. 883, ch. 213 §§ 2, 3, 4 (1925) *with* H.R. 2084 §§ 2, 3, 4, 80th Cong., 1st Sess. (1947) (recodifying the United States Arbitration Act as the FAA) *with* 9 U.S.C. §§ 2, 3, 4 (current language); *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (sections 1, 2, and 3 of the FAA "are integral parts of a whole."); *see also, e.g., Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement).[6]

Second, the language of the FAA is part of a policy to maintain a consistent *national* policy on arbitration—to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. The one exception, not applicable here, is "*if* [a state] . . . law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally", then that law may

[6] This Court need not address whether Sections 3 and 4 (or 3 *or* 4) of the FAA apply in state courts in order to divine that Congress intended arbitration clauses to be enforced only according to their terms. *Cf., e.g., Southland*, 465 U.S. at 12, 16 n.10 (reserving issues); *accord Volt*, 489 U.S. at 477 n.6. It is hard to discern how Section 3 could *not* apply to the states, however, at least to the extent of requiring that any state procedure for enforcing an arbitration clause provide for a stay and not diminish the protections of Section 2 precluding a court from rewriting such clauses. *See Moses H. Cone*, 460 U.S. at 26 ("state courts, as much as federal courts, are *obliged* to grant stays of litigation under § 3 of the Arbitration Act.") (emphasis added); *see also id.* at 26, nn. 34-35.

apply to invalidate an arbitration agreement. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (emphasis in original)).[7] Otherwise, Congress wishes the FAA to have the broadest possible effect. *See, e.g.*, H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasizing that "control over interstate commerce", the trigger for application of the FAA, "reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.").

Third, the language of the FAA also reflects a "statutory policy of *rapid and unobstructed* enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23 (emphasis added). The decision whether to impose class-wide arbitration on parties who had not clearly planned for or agreed to it will undoubtedly involve courts in the details of more arbitration clauses. That involvement will make dispute resolution slower, more burdensome, and more complex. *See, e.g., Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub. nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).[8] Courts will

[7] The South Carolina Supreme Court did not even purport to require *all* contracts in South Carolina to contain by implication a consent to class-wide procedures. It focused only on arbitration agreements. Thus, contrary to *Doctors Associates*, its rule "arose" only to govern such agreements, not contracts generally.

[8] The long history of arbitration from medieval times to the present has been a constant illustration of the tension between the desire of private persons for "less formality and expense than is involved in recourse to the courts" and the persistence of courts in adding to the complexity of arbitration because they "did not look very favourably on a practice which tended to diminish their jurisdiction." 14 William Holdsworth, *A History of English Law* at 187 (1964). This case indicates

cease to be gatekeepers simply opening the way to the path of arbitration and involving themselves as little as possible in its issues, *see Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002) (timeliness of claim under arbitration rules a matter for arbitrator to decide). They will instead have to become travel agents trying to book, on a case by case basis, a detailed itinerary of stops along that journey—for there are no settled guidebooks for class-wide arbitrations, no approved procedures, no clear limitations on what may or may not be done.[9]

Fourth, the language of the FAA is not merely precatory. As this Court held in *Southland* and *Perry*, "in enacting § 2 of the federal Act, Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 10); *accord, e.g., Volt*, 489 U.S. at 478-79. It is well-settled that "what cannot be done directly cannot be done indirectly."[10] Thus, no state should be permitted to

that, despite the FAA, courts still continue to give arbitration and the choices of private parties less than their due.

[9] For example, it is hard to predict the mechanisms that might be invented by various state courts for the "protection" of absent class members in arbitration, but it is easy to predict that such mechanisms will make the arbitral process more like litigation and more likely to require on-going judicial monitoring.

[10] *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867); *id.* ("The Constitution deals with substance, not shadows"); *accord, e.g., Doctors' Assocs.*, 517 U.S. at 687 n.3 (court cannot do what legislature could not do) (quoting *Perry*, 482 U.S. at 493 n.9); *Fairbank v. United States*, 181 U.S. 283, 294, 300 (1901) ("what cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result.").

circumvent the direct withdrawal of its power to require private parties to use a judicial forum (and the procedures such as class actions that are part of that forum) by instead requiring those parties to use a judicially-created arbitration forum (and class-wide arbitration procedures that will undoubtedly involve judicial monitoring) different than what the parties had provided in their arbitration agreement.[11]

Finally, the FAA clearly applies to the arbitration agreements in question here. This is not a case where the parties chose "to abide by the state rules of arbitration", *Volt*, 489 U.S. at 472. Instead, they specified that the FAA (not South Carolina law), would govern arbitration issues. *See Bazzle*, 569 S.E.2d at 356.[12] Unlike *Volt*, where it would have been "inimical to the policies underlying *state* and federal arbitration law" to ignore an explicit California statute that permitted a stay of arbitration, given that the parties had chosen California law and not the FAA to govern arbitration issues, 489 U.S. at 472 (emphasis added),

[11] While there may be some situations where arbitration protected by the FAA is preempted by other substantive federal law, *see, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 397-98, 402 n.17 (2002) (ERISA may preempt arbitration); *id.* at 403-04 (Thomas, J., dissenting) (same), no such federal law exists or was relied upon by the court below to justify its position.

[12] *Cf. Volt*, 489 U.S. at 484, 491-92 (concern whether FAA could be circumvented by a state court choosing to construe an arbitration clause "as having intended to exclude the applicability of federal law") (Brennan, J., dissenting).

here it would be inimical to federal law to impose a state policy on parties who did not choose state law.[13]

B. The South Carolina Supreme Court's decision conflicts with this Court's settled arbitration jurisprudence.

The standards of "efficiency and equity" and "judicial economy" imposed by the court below to attempt to justify its decision also conflict with settled arbitration jurisprudence from this Court that has guided and encouraged drafters of agreements for many years. Although the FAA "favors arbitration as a speedy, economical method of dispute resolution", *Frank Fiore Enters., Inc. v. Francis*, No. 86 Civ. 7241 (WCC), 1987 U.S. Dist. LEXIS 2711, at *11 (S.D.N.Y. Apr. 8, 1987), this Court has bluntly held that "[w]e . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims", *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).[14] As a result, the FAA requires arbitrations "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217.[15] Because nothing in the FAA or this Court's jurisprudence requires that any particular arbitration result in fewer judicial proceedings generally, there is no proper basis for creating a requirement (such as class-wide arbitration) so that any particular arbitration will result in fewer arbitrations (or any other supposed efficiency) generally, either. Put another way, Congress has already balanced the policies of efficiency, equity, and judicial economy against the benefits of enforcing arbitration clauses according to their terms, and has decided to favor the latter choice. The Supreme Court of South Carolina had no right to tilt that balance the other way.[16]

---

[13] In addition, unlike the California statute chosen by the parties in *Volt*, the South Carolina "law" announced below had never before existed. *Cf. id.* at 476 n.5 (emphasizing the *legislative* nature of the California law in question); *Champ*, 55 F. 3d at 278 (even if silence in arbitration agreement would permit class-wide arbitration, no such process permissible "absent some *statutory* authority to do so") (emphasis added) (Rovner, J., concurring). In short, this is not a case in which this Court must defer to a state court's construction of an existing state law chosen by the parties. *See, e.g., Mastrobuono*, 514 U.S. at 60 n.4. Nor is it a case where the court below could properly claim that it had "independent state grounds" for its decision, *see Bazzle*, 569 S.E. 2d at 360, simply by choosing to construe contract language so as to ignore the FAA's requirements.

[14] As noted earlier, the "primary purpose" of the FAA is to "ensure that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

[15] *Accord, e.g., Moses H. Cone*, 460 U.S. at 20 (FAA may "*require[]* piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis added); *Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993) (improper to consolidate arbitrations "despite possible inefficiencies created by such enforcement"); *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98, 103 (W.D. La. 1985) (national policy in favor of arbitration is so strong that it requires "piecemeal resolution or duplication of effort when necessary to give effect to an arbitration agreement."); *Brower*, 676 N.Y.S.2d at 573 (despite finding by trial court that a class action "may" be less costly than arbitration, "which is generally less costly than litigation", arbitration still required); *Harris*, 441 N.Y.S.2d at 76.

[16] This Court should, however, consider one efficiency issue: there are tens, if not hundreds, of millions of existing arbitration agreements in all fifty states that would be subject to interpretation for "efficiency and

Similarly, nothing in this Court's opinions considering the application of the FAA to smaller cases (such as may arise in the consumer and employment arenas), indicates that the FAA must be reinterpreted depending on the size of a putative claim. In the 1995 *Allied-Bruce Terminix* case, for example, this Court held that "Congress, when enacting this law [FAA], had the needs of consumers ... in mind.... Indeed, arbitration's advantages often would seem helpful to *individuals*, say, complaining about a product ...." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted) (emphasis added). In the 2001 *Circuit City* case, this Court held that "it is true here, just as it was for the parties to the contract at issue in *Allied-Bruce*, that there are real benefits to the enforcement of arbitration provisions. ... Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 122-123 (2001).[17]

---

equity" in a decision to apply or not apply particular class action procedures to their terms. To use this Court's reasoning from the *Circuit City* decision, "[t]he considerable complexity and uncertainty that the construction of" the FAA "urged by respondent would introduce into the enforceability of arbitration agreements" on class-wide bases "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many" parties already "in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

[17] In Stewart Kyd's late Eighteenth Century treatise on arbitration ("the best book on this subject"), among the categories of cases most

These principles flow naturally from a core value of our legal system often expressed by this Court: the value of upholding private contracts. *See, e.g., Volt*, 489 U.S. at 472; *see also* U.S. Const. art I § 10.[18] There is a lack of any "federal policy favoring arbitration under a certain set of procedural

---

suited to arbitration were "disputes of a trifling nature." 12 William Holdsworth, *supra* n. 8, at 393 (citing Stewart Kyd, *A Treatise on the Law of Awards* at 392-93 (1791)). (Kyd's treatise was one upon which our own early courts placed substantial reliance. *See, e.g., Eastman v. Burleigh*, 2 N.H. 484, 486-88 (1822).)

[18] The few courts that have in recent years sought to impose class action procedures on arbitration clauses that do not provide for it, or to reject such clauses because they would preclude class actions, typically ignore this core value. For example, it is well-settled in California that "'if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.' (*In re Garcelon* (1894) 104 Cal. 570, 591 [38 P. 414], quoting from the opinion of Sir G. Jessell, M.R., in *Printing Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 465)." *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.*, 826 P.2d 710, 720-21 (Cal. 1992); *accord, e.g., Vernon v. Drexel Burnham & Co.*, 125 Cal. Rptr. 147, 153 (Ct. App. 1975) ("there is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter.... The sanctity of valid contractual agreements in a free society, such as ours, is of paramount importance and is rooted in both the United States and California Constitutions, which predate and outweigh the body of law on class actions as presently evolving."). Yet the recent decision in *Ting v. AT&T*, No. 02-15416, 2003 U.S. App. LEXIS 2395, at *58 (9th Cir. Feb. 11, 2003), purportedly relying on California law to reject an arbitration clause because it would preclude class actions, not only effectively ignored the most recent statement by a California court on that subject, *see Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Ct. App. 2003), but gave no weight to the sanctity of private contracts.

rules" only because federal policy is clearly to "enforce[], according to their terms, . . . private agreements to arbitrate"—including whatever procedures are actually chosen in those agreements. *Volt*, 489 U.S. at 476; *accord, e.g., id.* at 479 ("By permitting the courts to 'rigorously enforce' . . . [arbitration] agreements according to their terms, *see Byrd, supra,* at 221, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind . . . the FAA."). To the extent that the court below ceased to give proper respect to this core value, its decision conflicts significantly with this Court's jurisprudence.[19]

While "as with any other contract, the parties' intentions control" an arbitration agreement, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626

[19] As another example of the extent of this conflict, an individual arbitration award simply does not have the same automatic *res judicata* and collateral estoppel effects as a litigated judgment. *See, e.g., McDonald v. City of West Branch*, 466 U.S. 284, 289-92 (1984); *see also, e.g., Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991); *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989); *Giles v. City of New York*, 41 F. Supp. 2d 308, 313 (S.D.N.Y. 1999); *see generally Dean Witter*, 470 U.S. at 222-23; *cf., e.g., Vandenberg v. Superior Court*, 982 P.2d 229, 234 n.2 (Cal. 1999) (no collateral estoppel effect at all to private arbitration awards in California). Thus, a party can engage in individual arbitration more freely, and with less concern about collateral consequences, than in court. By requiring class-wide arbitration by a party who had not agreed to it, however, the court below clearly sought to impose those otherwise collateral consequences. In effect, Green Tree is being forced to resolve more than "only those issues it specifically ha[d] agreed to submit to arbitration", an outcome forbidden by this Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), and *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

(1985), the FAA emphasizes that the written terms of such agreements are paramount. There was certainly no evidence here that the parties actually contemplated that their contract included a provision for class-wide arbitration despite the absence of any reference to such procedures in the written arbitration clause itself. Nor could the South Carolina Supreme Court—or any other court—simply presume so on the theory that because such procedures are available in many courts, they must be so important to the enforcement of the parties' substantive rights that the parties must have intended to include them. This would be precisely the kind of "generalized attack[] on arbitration" that this Court has consistently rejected as "'rest[ing] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . .'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).[20]

[20] A limited analogy to concepts of personal jurisdiction may be helpful. If an arbitration clause selects a particular set of arbitration rules, the parties may be deemed to have consented to the "jurisdiction" of that provider or set of rules. *Cf. Hanson v. Denkla*, 357 U.S. 235, 253 (1958) (there must " be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."). The benefits and protections of that "jurisdiction" should be respected, and the drafter cannot be deemed to have consented to some other "jurisdiction." Accordingly, if a court or arbitrator orders class-wide arbitration that is not required by the selected rules, any party should be entitled to avoid any award resulting from such arbitration. *See generally* 9.U.S.C. § 10; *cf. Transaero, Inc. v. Feurza Aearea Boliviana*, 162 F.3d 724, 728 (2d Cir. 1998) (judgment obtained without personal jurisdiction unenforceable), *cert.*

II. The South Carolina Supreme Court incorrectly treated access to class action procedures as a fundamental right.

In its decision, the court below favored class action procedures taken from its own judicial system and assumed that if such procedures are not available, society suffers an irremediable harm. Yet not only has Congress rejected, by enacting the FAA, the idea that society is harmed by using arbitration rather than judicial process to resolve civil disputes; it has actually imposed arbitration in *preference* to judicial proceedings in some instances. *See generally, e.g., Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602 (1993) (upholding mandatory arbitration provisions of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, *codified at* 29 U.S.C. § 1401(a)(1) (2000)). Similarly, where Congress has decided in very specific instances that states—rather than private parties—have special competence to control arbitration mechanisms, it has specifically remitted such responsibility to the states. *See* 47 U.S.C. § 252(b)(1) (2000) (arbitration provisions of Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56); *see generally AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *id.* at 402 (Thomas, J., concurring in part and dissenting in part).

The court below did not identify any such special delegation of procedural competence to it by Congress. Nor does anything in the FAA itself demonstrate any preference

denied, 526 U. S. 1146 (1999); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 23 (1st Cir. 1992) (same).

for procedures taken from state court systems over those defined by private parties. The court therefore tried to justify its imposition of class-wide arbitration procedures on parties who had not expressly chosen such procedures by inventing a special right to class-based relief: if it did not affirmatively uphold class-wide arbitrations, then "the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." *Bazzle*, 569 S.E.2d at 360.

This argument necessarily assumes that private parties have a fundamental, substantive right to class actions that may not be waived (if they may be waived at all) unless done so expressly. Yet there is no such fundamental right. Class actions are only, in this Court's words, a "procedural device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980); *see also, e.g., Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class action is merely a procedural device . . . .") (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).[21] As a result, and contrary to the assumption below, a party may "effectively prevent class actions against it without having to say it [is] doing so in [an] agreement." *Bazzle*, 569 S.E.2d at 360. Indeed, a party may effectively and

[21] This does not mean that all state activity is precluded by the existence of a private contract containing an arbitration clause. Such clauses govern relations between those covered, not between those covered and a state. *Cf. Lividas v. Bradshaw*, 512 U.S. 107 (1994) (arbitration policy and National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* do not preclude enforcement of wage claim by State Labor Commissioner on behalf of employee covered by collective bargaining agreement containing arbitration clause).

legally do so even when the method used does not embody the same strong Congressional policy as does arbitration.

For example, forum selection clauses that effectively preclude class actions have been upheld even though they contain no explicit waiver of class action procedures.[22] This is consistent with this Court's general view that businesses may include forum selection clauses in adhesion contracts because "it stands to reason that" customers bound by such contracts "benefit in the form of reduced [prices] . . . reflecting the savings that the [business] . . . enjoys by limiting the fora in which it may be sued." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991).[23] Using a forum

[22] *E.g., Koch v. America OnLine*, 139 F. Supp. 2d. 690, 694-96 (D. Md. 2000) (upholding choice of forum clause requiring all claims to be decided in Virginia over objection that Virginia does not permit class actions because dismissal in Maryland would not prevent the plaintiff from bringing an *individual* claim in Virginia); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1012 (D.C. 2002) (similar); *America Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (similar); *see Celmins v. America OnLine*, 748 So. 2d 1041, 1041-42 (Fla. Dist. Ct. App. 1999) (upholding same forum selection clause); *Groff v. America OnLine, Inc.*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at *16 (Super. Ct. R.I. May 27, 1998) (same); *but see America OnLine, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Ct. App. 2001) (refusing to uphold America OnLine choice of forum clause); *cf. Discover Bank*, 129 Cal. Rptr. 2d at 403-04 (rejecting analysis of *America OnLine* in the presence of FAA).

[23] The *Carnival Cruise Lines* forum selection clause prescribed Florida as the forum for all disputes for Washington residents who took a passenger cruise from California. In the absence of any "evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching", and given that "respondents . . . were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity", this Court saw no reason not to uphold the forum selection clause on the passengers' tickets. 499 U.S. at

selection clause to preclude class actions would certainly result in savings. There is no good reason to preclude such savings when they are the result of an arbitration clause instead, particularly since "[a]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).[24]

Courts have long recognized other reasons that parties may properly seek to avoid class actions, too. As the California Supreme Court noted in *Washington Mut. Bank v. Superior Court* (by rejecting the argument to the contrary), "businesses dealing with mass groups of consumers should . . . be permitted to rely on choice-of-law clauses as a means of avoiding involvement in a nationwide class action. . . . 'Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.'" 15 P.3d 1071, 1079-80 (Cal. 2001) (quoting *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974)).[25]

595. Congress later prohibited similar forum selection clauses on passenger cruise line tickets in cases of personal injury arising from negligence or fault. *See* 46 U.S.C. App. 183c (2002). Congress could presumably change the FAA with respect to the specific issue in this case, too.

[24] *Accord, e.g., Shearson/American Express v. McMahon*, 482 U.S. 220, 256 (1987); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *Weyerhauser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.), *cert. denied*, 469 U. S. 1061 (1984); *see also Cortez*, 529 U.S. at 201 (the FAA provides a "desired flexibility of parties in choosing a site for arbitration.").

[25] *Accord Harris*, 441 N.Y.S.2d at 76 ("the substantive law of contractual agreement takes precedence over the class action, which is

The court below, however, not only asserted in its decision that the drafter of an arbitration clause cannot avoid class action procedures "without having to say it was doing so in the agreement", but also that such a waiver of "class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." *Bazzle*, 569 S.E.2d at 360 & n. 21. Without any basis, this makes the "right" to class action procedures even more fundamental than, for example, the right to a jury trial.[26]

---

merely a procedural device for consolidating matters properly before the Court.") (citation omitted); *Vernon*, 125 Cal. Rptr. at 153. In effect, the court below has applied a kind of local *forum non conveniens* analysis to determine that an individual arbitration forum is an inconvenient one. This emphasizes the weakness of its decision, because the doctrine of *forum non conveniens* is merely a procedural venue theory. *E.g., American Dredging Co. v. Miller*, 510 U.S. 443, 453-45 (1994). Courts that have focused on the availability or denial of class action procedures to defeat the substantive law of arbitration clauses, *see, e.g., Ting*, No. 02-15416, 2003 U.S. App. LEXIS 2395 at *65-6, have generally fallen prey to this same confusion of means and ends, procedure and substance.

[26] No "right" to class action procedures appears in any federal statute applicable to this case. Even if a federal statute expressly permits class actions, that right will not supersede the right to an individual arbitration pursuant to an arbitration clause that does not mention class procedures. *See Gilmer*, 500 U.S. at 32. Nor can there be any "right" to class action procedures in arbitration by operation of the due process clause of the United States Constitution, U.S. Const. amend. XIV, cl. 1. As one court recently noted, "there is ample authority for the proposition that a private arbitration does not implicate due process concerns since . . . there is no state action involved . . . ." *Sawtelle v. Waddell & Reed, Inc.*, No. 2330, 2003 N.Y. App. Div. LEXIS 1243, at *14 (Feb. 11, 2003) (overturning

The right to a jury trial is both an ancient part of our nation's legal system and a right explicitly preserved in the Constitution. *E.g.*, U.S. Const. amend. VII; 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2301 (2d ed. 1995). As this Court once observed, "[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 752-53 (1942). Yet "[i]t is clear that the parties to a contract may by prior written agreement waive the right to jury trial." *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (5th Cir. 1985).[27] Furthermore, this waiver need *not* be explicit when it is the result of the enforcement of an arbitration clause protected by the FAA. *E.g., Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration agreement."), *cert. denied sub nom. Dillard v. Security Pac. Corp.*, 506 U. S. 1079 (1993).[28]

---

arbitration award not as violative of due process, but as "irrational", by analogy to *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)), *citing, e.g., Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *Sanders v. Gardner*, 7 F. Supp. 2d 151, 174-75 (E.D.N.Y. 1998).

[27] *Accord, e.g., Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) ("Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy."), *cert. denied*, 490 U. S. 1021 (1989); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (right to jury trial, although fundamental, may be waived by contract).

[28] *Accord, e.g., Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 (3rd Cir.) (upholding plaintiff's implied waiver of right to jury trial through arbitration agreement), *cert denied sub nom. Peacock v. Great Western Mortg. Corp.*, 522 U. S. 915 (1997); *see also, e.g., Arkoosh v. Dean Witter & Co.*, 415 F.

Class actions, particularly the modern class action with procedures of the kind imposed by the court below, lack the historical importance of the right to a jury trial. *See generally, e.g.*, Geoffrey C. Hazard, Jr., *et al.*, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849 (1998); 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1751 (2d ed. 1986). Class actions (derived primarily from modern court rules) are not enshrined in our Constitution, either. In short, access to class action procedures must be far less a fundamental right than access to jury trials—and jury trials can be waived both explicitly and (at least through the operation of an arbitration clause) implicitly. The assumption of the court below that access to class action procedures is such a fundamental right that it either must be expressly waived in an arbitration clause—or perhaps cannot be waived at all[29]—is simply unsupportable.

Supp. 535, 544 (D. Neb. 1976). In addition, the FAA "does [not] . . . prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement", *Volt*, 489 U.S. at 478, so it is clear that, at worst, parties could agree to exclude any class-wide claims from an arbitration agreement, yet require the arbitration of an individual's claim to proceed first. If the individual lost, he or she would probably not be an adequate class representative for others. *See generally Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Furthermore, he or she could, if he or she won an arbitration, act as a class representative only for others without an arbitration clause or who had also won individual arbitrations. There is little practical difference, therefore, between what is already expressly permitted by *Volt* under the FAA and what Petitioner seeks from this Court.

[29] *See Bazzle*, 569 S.E.2d at 360 n. 21; *but see Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (explicit class-action exemption in arbitration clause enforceable), *cert. denied*, 531 U.S. 1145 (2001).

As noted earlier, this Court has consistently rejected efforts to modify the effects of the FAA because of "suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . ." *Rodriguez*, 490 U.S. at 481; *accord, e.g., Gilmer*, 500 U.S. at 30. The decision below simply represents another such effort, albeit one not even based on a direct concern about substantive law, but on the absence from most arbitrations of a procedural device of recent vintage and less than Constitutional importance. *See also, e.g., Moses H. Cone*, 460 U.S. at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding *any* state substantive *or procedural* policies to the contrary.") (emphasis added). If allowed to stand, the decision below would encourage the courts of fifty different states to reach innumerable different conclusions, based on a vague standard of "equity and efficiency", as to whether to impose unexpected and unknown class action procedures on existing arbitration agreements otherwise free of such complications. This would not only be a rejection of the FAA policy of enforcing arbitration agreements according to their terms; it would destroy the uniform application of federal arbitration law contemplated in the FAA and necessary to the continued widespread use of arbitration in our national economy. This Court should not permit such a result.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

MICHAEL E. MALAMUT
CHRISTINE HUGHES
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660

CHRISTOPHER M. MASON*
NIXON PEABODY LLP
437 Madison Avenue
New York, New York
10022
(212) 940-3000

J. VANN VOGEL
JEROME KARNICK
VERIZON WIRELESS
180 Washington Valley Road
Bedminster, New Jersey 07921
(908) 306-7300

DAVID H. GIBBS
JOHN R. PAGLIARO
NIXON PEABODY LLP
101 Federal Street
Boston, Massachusetts
02110
(617) 345-1000

Counsel for New England Legal Foundation and Cellco Partnership d/b/a Verizon Wireless as Amici Curiæ

*Counsel of Record

February 24, 2003

MOTION FILED

FEB 2 4 2003

(9)

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.

Petitioner,

v.

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for all others similarly situated; DANIEL B. LACKEY, GEORGE BUGGS, and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 24, 2003

24 pp

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. WLF has been unable to obtain the consent of counsel for Respondents, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and participates in administrative proceedings in a variety of areas, WLF devotes substantial resources to promoting civil justice reform and freedom of contract. To that end, WLF has appeared before this Court as well as other federal and State courts in cases touching upon the enforceability and interpretation of arbitration agreements. *See, e.g., PacifiCare Health Systems, Inc. v. Book*, No. 02-215 (dec. pending). WLF has consistently supported the rights of private parties to enter into binding agreements to arbitrate any disputes arising between them, as a quicker and more efficient alternative to litigation.

WLF has also appeared regularly in cases addressing the proper scope of class action litigation. *See, e.g., Dow Chemical Co. v. Stephenson,* No. 02-271 (dec. pending); *Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367 (1996); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000). WLF has repeatedly expressed its concern over the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of businesses.

WLF is concerned that the decision of the South Carolina Supreme Court, if allowed to stand, will undermine the effectiveness of arbitration as an efficient alternative to litigation, by wedging into the arbitration process all of the detailed procedures inherent in class action litigation. That result is particularly problematic when, as here, there is no indication that the parties ever consented to the adoption of class action procedures when they entered into an arbitration agreement. WLF is concerned that if the decision below stands, parties will be more reluctant to enter into arbitration agreements because they will justifiably fear that some court will later construe the agreements as consent to being subjected to class-based arbitration, which generally lacks the procedural protections afforded by courts in class action litigation.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no direct interest in the outcome of this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective distinct from that of any party.

For the foregoing reasons, WLF respectfully requests that the Court allow it to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: February 24, 2003

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. CLASS ACTIONS ARE UNWORKABLE IN THE ARBITRATION CONTEXT BECAUSE ABSENT CLASS MEMBERS COULD NOT BE BOUND BY AN ARBITRATION AWARD WITH WHICH THEY WERE DISSATISFIED . . . 6

II. WHILE PARTIES ARE FREE TO AGREE TO CLASS-BASED ARBITRATION, IT IS UNREASONABLE EVER TO ASSUME THEY HAVE DONE SO GIVEN THE ONE-WAY NATURE OF CLASS-BASED ARBITRATION AWARDS . 11

III. THE DECISION TO ALLOW CLASS-WIDE ARBITRATION WAS MADE BY THE COURTS, NOT THE ARBITRATOR, AND THUS IS NOT ENTITLED TO ANY SPECIAL DEFERENCE 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page**

AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986) 17
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 21 (1991) 6
Hansberry v. Lee, 311 U.S. 32 (1940) 7
Hines v. Davidovitz, 312 U.S. 52 (1941) 13
Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588 (2002) 17
Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982) 10
Martin v. Wilks, 490 U.S. 755 (1989) 7
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 11, 12, 13
Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) 6
Phillips Petroleum v. Shutts, 472 U.S. 797 (1985) 7, 8, 9, 10
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 9, 14
Southland Corp. v. Keating, 465 U.S. 1 (1984) 16
Volt Information Sciences v. Bd. of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 8, 11, 13, 14

Page

Statutes:

Federal Arbitration Act, 9 U.S.C. §§ 1-16 . . . . . *passim*
§ 2 16
§ 4 . . . . . 4, 16

S.C. Code Ann. §§ 37-10-102(a), -105 2

Miscellaneous:

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449 (1981) 7

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Brief for Petitioner.

In brief, Petitioner Green Tree Financial Corp. ("Green Tree") is challenging under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, two interrelated class action awards. Those two awards require Green Tree to pay nearly $27 million in statutory damages, attorney fees, and costs to two classes consisting of more than 3,700 individuals. One of the arbitration proceedings was initiated by Petitioners Lynn and Burt Bazzle (the "Bazzle arbitration"). The other proceeding was initiated by Daniel B. Lackey and George and Florine Buggs (the "Lackey arbitration"). Although the arbitration agreements entered into between Green Tree and those individuals are "silent" on the subject of class-based arbitrations, the South Carolina courts directed the arbitrations to proceed as class actions. Green Tree contends that South Carolina's decision to subject them to class-based arbitration is inconsistent with, and therefore is preempted by, the FAA.

The Bazzle Arbitration. In 1995, the Bazzles entered into a retail installment contract and security agreement with

Green Tree to finance home improvements. The agreement included an arbitration clause which provided, *inter alia,* that all disputes "arising from this contract" were to be resolved by an arbitration proceeding governed by the FAA.

The Bazzles later claimed that Green Tree, when it entered into the loan agreement, violated the attorney and insurance-agent notice preference provisions of South Carolina law. *See* S.C. Code Ann. §§ 37-10-102(a), -105. Their suit in South Carolina state court was later certified as a class action (over Green Tree's objections both that certification was unwarranted and that any action by the court should be stayed pending arbitration) on behalf of other South Carolinian who had entered into home improvement loan agreements with Green Tree. The court then ordered that the class action proceed before an arbitrator appointed by the court. On July 24, 2000, the arbitrator ruled in favor of a plaintiff class of 1,899 individuals. Pet. App. 55a-81a. The arbitrator found that Green Tree had violated South Carolina law in connection with the loan agreements entered into with each class member. Although the plaintiffs did not attempt to show that they had suffered any damages as a result of the violations, the arbitrator imposed a class-wide penalty of between $5,000 and $7,500 per transaction -- for a total award of $10,935,000. *Id.*. 69a-71a. He also awarded the plaintiffs $3,645,500 in attorney fees. *Id.* 71a-81a. On September 15, 2000, the South Carolina Court of Common Pleas confirmed the award. *Id.* 27a-35a.

The Lackey Arbitration. Daniel Lackey and his fellow class members entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. The agreements contained arbitration

clauses that were essentially identical to the arbitration clause at issue in the Bazzle arbitration.

Daniel Lackey and George and Florine Boggs in 1996 filed a putative class action against Green Tree in South Carolina state court, alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. In 1998, the South Carolina Court of Appeals ordered (over the plaintiffs' objection) that the arbitration clause be enforced. Thereafter, the individual who was already presiding over the Bazzle arbitration was appointed as arbitrator. He later granted the plaintiffs' motion to certify the arbitration as a class action on behalf of South Carolinians who had entered into manufactured home loans with Green Tree, agreeing with the plaintiffs that certification was warranted for the reasons expressed by the trial court in the Bazzle proceedings.

On July 24, 2000 (the same day he ruled in the Bazzle arbitration), the arbitrator ruled in favor of a plaintiff class of 1,840 individuals. *Id.* 82a-109a. Although the plaintiffs did not attempt to show that they had suffered any damages as a result of the violations of South Carolina law, the arbitrator imposed a class-wide penalty of $5,000 per transaction -- for a total award of $9,200,000. *Id.* at 96a-98a. He also awarded the plaintiffs $3,084,918 in attorney fees and costs. *Id.* 98a-106a. On December 19, 2000, the South Carolina Court of Common Pleas confirmed the award. *Id.* 36a-54a.

Green Tree appealed both actions, which eventually were consolidated in the South Carolina Supreme Court. On August 26, 2002, that court affirmed both awards, rejecting Green Tree's contention that the arbitrations should not have been permitted to proceed on a class-wide basis. *Id.* 1a-26a.

Initially, the court examined the arbitration clauses and determined that they were "silent" regarding class-wide arbitration. *Id.* 19a. The court stated that the language relied on by Green Tree was ambiguous and "should, therefore, be construed against the drafting party, Green Tree." *Id.* Although acknowledging that (as specified by the parties) the arbitrations were governed by the FAA, *id.* 11a, the court distinguished several federal cases -- which held that class-wide arbitration is impermissible unless explicitly agreed to by the parties -- on the ground that those cases were based on § 4 of the FAA, which the court held inapplicable to state-court proceedings. *Id.* 19a-20a.

The court went on to identify an "independent state ground" for affirmance: as a matter of South Carolina law, *trial courts* have "discretion" to permit class-wide arbitration when the arbitration clause is silent regarding that issue. *Id.* 20a. The court held that granting such discretion was consistent with South Carolina's policy of "strongly favor[ing] arbitration" and that class-wide arbitration may be ordered "when the arbitration agreement is silent if it would serve efficiency and equity and would not result in prejudice." *Id.* 21a-22a. The court worried that if such discretion were not granted, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Id.* 22a. The court also held that arbitral decisions are subject to limited review; the court upheld the arbitral awards in the absence of evidence that they were issued "in manifest disregard of the law" -- a level of error that could only be reached by showing that "the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit,

and clearly applicable to the case." *Id.* 24a (emphasis in original).

SUMMARY OF ARGUMENT

Under well-established due process and FAA principles, absent class members are not bound by judgments entered in arbitration proceedings that proceed on a class-wide basis. By their very nature, arbitrations are informal proceedings in which it is virtually impossible to gauge the adequacy of the class representative's representation of absent class members. The inability of reviewing courts to ensure adequate representation throughout the proceedings – combined with the fact that the arbitration process is premised on the voluntary participation of all parties – precludes any effort to bind absent class members.

Accordingly, there can be no justification for interpreting an arbitration provision as permitting class-wide arbitration, in the absence of a clause *explicitly* authorizing such arbitration. Interpreting arbitration provisions in this manner in the absence of explicit authorization greatly complicates arbitration proceedings, thereby depriving parties of the simple, informal, and quick procedure promised them under the FAA when they agreed to arbitrate their disputes. Yet, because absent class members cannot be bound by such class-wide arbitration, there are no corresponding benefits to offset those costs.

The great danger from the decision below is that it will discourage parties from agreeing to arbitrate future cases. In light of the decision below, contracting parties could well conclude that no amount of disclaimers can insulate them from a judicial finding that they are subject to class-wide

arbitration. If so, they are unlikely to agree to arbitrate future disputes, a result inimical to the purposes served by the FAA. Because the decision below "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as expressed by the FAA, it is preempted by the FAA.

ARGUMENT

I. CLASS ACTIONS ARE UNWORKABLE IN THE ARBITRATION CONTEXT BECAUSE ABSENT CLASS MEMBERS COULD NOT BE BOUND BY AN ARBITRATION AWARD WITH WHICH THEY WERE DISSATISFIED

Consideration of whether class-wide arbitration is consistent with the FAA must begin with an examination of the practicability of class-wide arbitration as a means of resolving large numbers of disputes involving common questions of law or fact. Unless class-wide arbitration can predictably resolve disputes, there can be no justification for complicating arbitration proceedings (by, as here for example, increasing the number of claims more than a thousand fold, from three to 3,700) and thereby depriving parties of the "simplicity, informality, and expedition" promised them under the FAA when they agreed to arbitrate their disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 21, 30 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The clear answer is that class-wide arbitration *cannot* resolve disputes within any degree of finality. That is because, under well established due process principles, absent class members cannot be bound by arbitrations conducted as

were these arbitrations, and as arbitrations are commonly conducted elsewhere. In the absence of the ability to bind absent class members, no rational party to a contract would ever agree to class-wide arbitration of contract disputes.

It is "'a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449 at 417 (1981)). A judgment or decree among parties to a lawsuit resolves issues as among them, "but it does not conclude the rights of strangers to those proceedings." *Id.*

Class action litigation represents one very limited exception to that broad principle. Under limited circumstances a nonparty to a lawsuit may be bound by a judgment when a similarly situated individual who *is* a party purports to act on behalf of the nonparty and adequately represents the nonparty throughout the proceedings. *Id.* at 762 n.2; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985). This class-action exception to the general rule "was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder." *Id.* at 808. The Court has permitted absent class members to be bound by class action judgments in the limited circumstances described above both because of the practical necessity of a judicial device that allows for the efficient adjudication of massive

numbers of similar claims and because the litigation process allows the issue of adequate representation to be closely monitored -- both by the trial judge and by judges hearing appeals from a class action judgment. *Id.* at 808-812.

None of those justifications for the class-action exception are applicable to class-based arbitrations. The entire arbitration process is based on the concept of consent. This Court has recognized that "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Information Sciences v. Bd. of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Thus, an individual who has been included in a certified class in a class-based arbitration cannot be compelled to adjudicate his claims in the arbitral forum -- even if he has been notified of the arbitration and has failed to exercise a right to opt out. Every party to a contract has a due process right to seek redress under that contract in a court of law (and, in many instances, to have his claims tried before a jury); in adopting the FAA, Congress made clear that that right will not be extinguished in the absence of an explicit agreement by a contracting party to submit his claims to arbitration. And even if a party has agreed to arbitration, he has the right to insist on arbitration pursuant to the terms of his own arbitration clause (*e.g.*, the right to a say in choosing the arbitrator) and not to be forced to participate in someone else's arbitration.

Nor can binding nonparties to arbitration awards be justified as a practical necessity; *i.e.*, as the only practicable means of adjudicating massive numbers of similar claims. Both federal and state courts permit binding class actions to proceed in appropriate circumstances, and thus there is no pressing need to create a parallel system of class-based

arbitrations. On rare occasions, it may be that similarly situated individuals who have signed arbitration clauses cannot effectively vindicate their rights through individual arbitrations but could do so if allowed to press their claims collectively. Under those circumstances, the FAA's solution is to deem the arbitration clauses unenforceable (thereby freeing the individuals to pursue class action litigation in a court), not to permit class-based arbitration. *See, e.g., Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 229-30 (1987). *See also Shutts,* 472 U.S. at 809 (class-action exception justified in part because judicial class actions "may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

Moreover, the careful monitoring of adequacy of representation that *Shutts* deemed so critical to the class-action exception simply is not possible in the context of arbitration. For example, rarely is a transcript maintained of an arbitration proceeding, thus making it virtually impossible for a reviewing court to determine whether the class representative and her counsel adequately represented the interests of absent class members throughout the arbitration proceedings. Indeed, in making his decision an arbitrator is generally not required to provide any findings of fact or conclusions of law; so a class-based arbitration award may well state nothing regarding the arbitrator's findings as to adequacy of representation.

In sum, absent class members cannot be bound by awards issued after arbitrations conducted as were these arbitrations, and as arbitrations are commonly conducted elsewhere. In the absence of binding judgments, class-based arbitrations are wholly unworkable and deprive parties of the

efficiencies that caused them to agree to arbitration in the first instance.

As the Court recognized in *Shutts,* "Whether it wins or loses, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the class action defendant] is bound." *Shutts,* 472 U.S. at 805. For example, even though Green Tree lost in this case, it would at least like assurances that absent class plaintiffs are barred from seeking additional damages beyond the $5,000 to $7,500 in statutory damages awarded to each of the class members. But as the preceding discussion indicates, Green Tree can have no such assurances; an absent class member who claims to have suffered damages in excess of the amount awarded is likely to assert that he cannot be bound by the award from an arbitration proceeding to which he never consented and in which the adequacy of representation could not be closely monitored.

Some courts that have permitted class-based arbitrations have sought to alleviate the problems cited above by increasing court supervision of the arbitration process whenever a class-based proceeding is certified. *See, e.g., Keating v. Superior Court,* 645 P.2d 1192, 1209 (Cal. 1982) (court "would have to make initial determinations regarding certification and notice to the class, and . . . exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Such measures do not, of course, address the fact that absent class members have not affirmatively consented to the arbitration. More importantly, such measures add significantly to the complexity of the arbitration process, thereby depriving parties of the simple and expeditious

proceedings that, as the FAA recognizes, parties bargain for when entering into arbitration agreements.[1]

II. WHILE PARTIES ARE FREE TO AGREE TO CLASS-BASED ARBITRATION, IT IS UNREASONABLE EVER TO ASSUME THEY HAVE DONE SO GIVEN THE ONE-WAY NATURE OF CLASS-BASED ARBITRATION AWARDS

It is the policy of the FAA to enforce the agreements of contracting parties with respect to arbitration of disputes. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) ("[T]he central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'") (quoting *Volt*, 489 U.S. at 479); *id.* at 57 ("[P]arties are generally free to structure their arbitration agreements as they see fit."). Thus, parties to a contract are free, if they so desire, to specify the use of class-based arbitration proceedings to resolve any contract disputes.

But it is highly unlikely that parties would ever intend that their disputes should be arbitrated on a class-wide basis. Because, as demonstrated above, absent class members would not be bound by any judgment, parties to arbitration realize that they have nothing to gain and much to lose from class-based arbitration. Any effort to discern the intended meaning of an arbitration clause must begin with a recognition of the distaste with which the contracting parties are likely to view class-based arbitration.

---

[1] The extreme complexity of the Bazzle and Lackey arbitrations is well illustrated by the size of the attorney fees awarded by the arbitrator -- a total of more than $6.7 million.

At no point in its analysis did the South Carolina Supreme Court register any recognition of the one-sided nature of the class-based arbitration it was imposing on Green Tree. Instead, the court reached its determination that class-based arbitration was permitted under the arbitration clause by purporting to employ rules of statutory construction based on South Carolina law.

First, the court determined that the arbitration clause was "silent" regarding class-wide arbitration. Pet. App. 19a.[2] The court concluded that that silence created an "ambiguity" regarding the availability of class-wide arbitration, and that the ambiguity should be construed against Green Tree as the drafting party. *Id.* That conclusion is far from clear, even as a matter of South Carolina law. As this Court explained in *Mastrobuono*: "[T]he common-law rule of contract interpretation that a court should construe ambiguities against the interest of the party that drafted it . . . [is intended] to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono*, 514 U.S. at 63-64. The Court applied the common-law rule in that case because it deemed it unlikely that stock brokerage customers would have had "any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right" to sue for punitive damages. *Id.* at 64. In contrast, it cannot be seriously contended that the common-

[2] That conclusion is highly questionable. The arbitration clauses provide for arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract, or the relationships which result from this contract." *Id.* 110a. If parties specify that they agree to arbitrate disputes arising from a particular contract, it is logical to conclude that they have *not* agreed to arbitrate disputes arising from another contract.

law rule needs to be applied in this case in order to protect Green Tree's customers "from an unintended or unfair result." Given that the parties are unlikely to have intended (had they written a clause directly addressing the issue) to permit class-based arbitration that could bind the parties but would not bind absent class members, a ruling that no class-based arbitration is permitted can hardly be deemed "an unintended or unfair result."

The real danger here is that by imposing class-based arbitration procedures in the face of a "silent" arbitration clause, the South Carolina courts are discouraging parties from agreeing to arbitration in future cases. In light of the decision below, contracting parties could well conclude that no amount of language (of the "disputes . . . arising from or relating to *this* contract" variety deemed ambiguous here) will insulate them from a judicial finding that they are subject to class-wide arbitration. If so, they are unlikely to agree to arbitrate future disputes.

But any state policy that significantly discourages arbitration of disputes is contrary to the federal policy embodied in the FAA. In interpreting arbitration clauses, "'due regard must be given to the federal policy favoring arbitration.'" *Mastrobuono*, 514 U.S. at 63 (quoting *Volt*, 489 U.S. at 476). Because the decision below "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" as expressed by the FAA, it is preempted by the FAA. *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941).

Respondents insist that "'[t]here is no federal policy favoring arbitration under a certain set of procedural rules'" and thus that "States are . . . free to determine whether,

under state law, arbitrations may proceed on a class-wide basis." Brief in Opposition to Certiorari Petition at 14 (quoting *Volt,* 489 U.S. at 476). Respondents' citation to *Volt* is inapposite. In that case, the parties had expressly agreed to the applicability of the California arbitration rule at issue. In contrast, the parties in this case specified, as the South Carolina Supreme Court acknowledged, that "Green Tree's arbitration clause is governed by the FAA." Pet. App. 11a n.9. Moreover, the Court determined that the California arbitration rule at issue in *Volt* was one "manifestly designed to encourage resort to the arbitral process." *Volt,* 489 U.S. at 476. The same cannot be said regarding the decision below, which is likely to discourage parties from including arbitration clauses in future contracts.

In light of the federal policy of encouraging arbitration of contract disputes, the only reasonable interpretation of the arbitration clause at issue in this case is that the parties did not intend to permit class-wide arbitration of claims. Directing arbitration to proceed on the basis of individual claims will not deprive individual claimants of an effective remedy against Green Tree. The award of from $5,000 to $7,500 for individual claims, in addition to the award of hefty attorney fees, makes it well worth the while of an individual claimant to pursue her claims against Green Tree.[3]

---

[3] As noted previously, in those cases in which potential recoveries are too small to make arbitration of individual claims an effective means of vindicating substantive rights, courts should be directed to declare the arbitration provision unenforceable and permit the parties to seek judicial remedies, rather than to permit class-wide arbitration. *Shearson/American Express*, 482 U.S. at 229-30.

III. THE DECISION TO ALLOW CLASS-WIDE ARBITRATION WAS MADE BY THE COURTS, NOT THE ARBITRATOR, AND THUS IS NOT ENTITLED TO ANY SPECIAL DEFERENCE

In their opposition to the petition for certiorari, Respondents insisted that the decision to impose class-wide arbitration was made by the arbitrator, not the South Carolina state courts. Opp. Br. 25-28. Respondents argue that the Court should defer to the arbitrator's decision in this regard because "by agreeing to submit the construction of their contract to an arbitrator, the parties bargained for the procedures he devised." *Id.* 26.

Respondents' arguments can be squared with neither the decision of the South Carolina Supreme Court nor the orders of the trial courts. The South Carolina Court of Common Pleas in the Bazzle proceeding unambiguously directed the arbitration to proceed on a class-wide basis. Pet. App. 3a-4a. In his subsequent decision, the arbitrator gave no hint that he felt at liberty to reverse that decision. *Id.*- 82a-109a.

The impetus for class-wide arbitration in the Lackey proceeding is less clear. On the one hand, unlike in the Bazzle proceeding, the trial court never entered an order requiring class-wide arbitration. On the other hand, the arbitrator in the Lackey proceeding was the same arbitrator as in the Bazzle proceeding, the Lackey Respondents argued that the reasoning of the district court order in the Bazzle proceeding also required class-wide arbitration of the Lackey proceeding, and the arbitrator accepted that argument.

But whatever doubt there may have been about the source of class-wide arbitration in the Lackey proceeding was

erased by the decision of the South Carolina Supreme Court. At no point in its decision did the court indicate that its affirmance of class-wide arbitration was based on a decision to grant deference to an arbitrators' reasonable interpretation of a arbitration clause. Rather, the court engaged in its own *de novo* analysis of the Green Tree arbitration clause. *Id.* 19a.[4] The court held, alternatively, that the class-wide arbitration could be affirmed based on *trial courts'* "discretion" to permit class-wide arbitration when the arbitration clause is silent on the issue. *Id.* 20a. The court held that trial courts should exercise that discretion based on whether class-wide arbitration "would serve efficiency and equity and would not result in prejudice." *Id.* 21a-22a. By so holding, the South Carolina Supreme Court made clear its view that the availability of class-wide arbitration was an issue for the courts to decide. Thus, contrary to Respondents' argument, the decision to permit class-wide arbitration cannot be defended as one based on the

---

[4] The court distinguished several federal decisions -- which held that class-wide arbitration is impermissible unless explicitly agreed to by the parties -- on the ground that those cases were based on § 4 of the FAA, which the court held inapplicable to state-court proceedings. *Id.* 19a-20a. The federal decisions cannot be distinguished on that basis; they were not based solely on an interpretation of § 4. While the applicability of FAA § 4 to state court proceedings is an open question, it is settled law that FAA § 2 is applicable in both federal and state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Section 2 provides that arbitration agreements covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As noted above, the South Carolina Supreme Court's interpretation of the Green Tree arbitration clause in a manner that will actively discourage use of arbitration agreements violates both Section 2 and the pro-arbitration policy underlying the FAA.

arbitrator's reasonable interpretation of an ambiguous contract provision.

Respondents' argument does, however, serve to point out another basic flaw in the South Carolina Supreme Court's analysis. The question whether a dispute is subject to arbitration at all -- the "question of arbitrability" -- "is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). But the Court has made clear that the phrase "question of arbitrability" has a rather limited scope, and once that question has been answered in the affirmative, it is up to the arbitrator to decide procedural questions, regardless how important those procedural questions may be in the ultimate disposition of the arbitration. *Id.* at 592. The issue whether the parties intended to permit arbitration on a class-wide basis would seem to be the type of procedural issue that *Howsam* assigns to the arbitrator for initial determination. Thus, the South Carolina Supreme Court erred in assigning that issue to the courts for decision, and in upholding the court of common pleas's discretionary decision that class-wide arbitration was appropriate. Accordingly, at the very least the Court should reverse the judgment below, with directions that the arbitrators hearing these proceedings on remand should decide the class-wide arbitrability issue without regard to any of the orders issued to date by the South Carolina courts.

But because the issues raised by this case are highly important and likely to recur frequently, WLF respectfully suggests that the Court use this opportunity to express its views on the propriety of class-wide arbitration orders in the

face of arbitration agreements that are "silent" on the issue. For all the foregoing reasons, WLF respectfully requests that the Court hold that orders directing class-wide arbitration -- in the absence of a provision in the arbitration clause *expressly* authorizing such arbitration -- stand as an obstacle to the accomplishment and execution of Congress's purposes in adopting the FAA and are therefore preempted.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the decision of the South Carolina Supreme Court be reversed.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: February 24, 2003

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

(11)

No. 02-634

In the Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for the Amicus Curiae

24pp

QUESTION PRESENTED

Amicus will address the following question which may be necessary to resolution of the issue before the Court:

Whether the failure to provide for class action procedures (or the express prohibition of them) in an arbitration agreement renders the agreement inherently unconscionable, such that it cannot be enforced unless class procedures are judicially superimposed.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE MONETARY CLASS ACTION IS A RECENT INNOVATION THAT IS NOT SO FUNDAMENTAL THAT ITS UNAVAILABILITY CAN BE DEEMED TO RENDER AN ARBITRATION PROVISION UNCONSCIONABLE 2

II. ARBITRAL CLASS ACTIONS ARE NOT NECESSARY TO VINDICATE THE RIGHTS OF CONSUMERS 6

III. IMPOSING CLASS ACTIONS ON ARBITRAL PARTIES WOULD UNDERMINE THE BENEFITS OF ARBITRATION 10

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 10, 11, 14

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997) 4

American Heritage Life Ins. Co. v. *Orr*, 294 F.3d 702 (5th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003) 6

Arriaga v. *Cross Country Bank*, 163 F. Supp. 2d 1189 (S.D. Cal. 2001) 5

Baravati v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) 5

Barnes v. *Gorman*, 122 S. Ct. 2097 (2002) 9

Bradford v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001) 7

Brown v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996) 5

Buckhannon Bd. & Care Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) 9

Carnival Cruise Lines, Inc. v. *Shute*, 499 U.S. 585 (1991) 12

Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 6, 11

Christopher v. *Brusselback*, 302 U.S. 500 (1938) 4

Cole v. *Burns Int'l Sec. Servs.*, 105 F.2d 1465 (D.C. Cir. 1997) 14

TABLE OF AUTHORITIES – continued

Page(s)

COMSAT Corp. v. *National Science Found.*, 190 F.3d 269 (4th Cir. 1999) 13

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 6, 9, 15

Green Tree Fin. Corp. v. *Randolph*, 531 U.S. 79 (2000) 7, 8

In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) 14

In re Security Life Ins. Co., 228 F.3d 865 (8th Cir. 2000) 13

Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) 4, 8, 9, 14

Keating v. *Superior Court*, 183 Cal. Rptr. 360 (Cal. 1982), rev'd on other grounds sub nom *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) 13

Lloyd v. *MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82 (3d Cir. 2002) 5

Lomax v. *Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360 (N.D. Ga. 2002) 5

Lozano v. *AT&T Wireless*, 216 F. Supp. 2d 1071 (C.D. Cal. 2002) 5

Luong v. *Circuit City Stores, Inc.*, 2001 WL 935317 (C.D. Cal. Mar. 28, 2001) 7

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 5

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 9, 10, 15

TABLE OF AUTHORITIES – continued

Page(s)

Morrison v. *Circuit City Stores, Inc.*, 2003 WL 193410 (6th Cir. Jan. 30, 2003) 7

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 3, 4

Pick v. *Discover Fin. Servs., Inc.*, 2001 WL 1180278 (D. Del. Sept. 28, 2001) 5

Rains v. *Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) 5

Randolph v. *Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001) 5

Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 6

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 15

Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 9

Snowden v. *Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir.), cert. denied, 123 S. Ct. 695 (2002) 5

Stein v. *Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001) 5

Ting v. *AT&T*, 2003 WL 292296 (9th Cir. Feb. 11, 2003) 5

Vigil v. *Sears Nat'l Bank*, 2002 WL 987412 (E.D. La. May 10, 2002) 5

Wabash R.R. v. *Adelbert College*, 208 U.S. 38 (1908) 4

Zawikowski v. *Beneficial Nat'l Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) 5

TABLE OF AUTHORITIES – continued

Page(s)

STATUTES, RULES AND REGULATIONS

9 U.S.C. § 2 15

Truth in Lending Act, 15 U.S.C. § 1640 8

Y2K Act of 1999, Pub. L. No. 106-37 § 2, 113 Stat. 186 10

Equity Rule 38, 226 U.S. 630 (1913) 4

Equity Rule 48, 42 U.S. (1 How.) xli (1843) 4

Fed. R. Civ. P. 23 (1937) 4

Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) xvii (1822) 3

S. Ct. Rule 37.6 1

MISCELLANEOUS

AAA Commercial Arbitration Rule 45 8

AAA Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee, Principle 14. Arbitral Remedies, available at http://www.adr.org 8

AAA, *Supplementary Procedures for the Resolution of Consumer-Related Disputes and Administrative Fee Waivers and Pro Bono Arbitrators Services*, available at http://www.adr.org 8

Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249 (2001) 3

Developments in the Law – Class Actions, 89 HARV. L. REV. 1318 (1976) 13

TABLE OF AUTHORITIES – continued

Page(s)

Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001) 8, 13

H.R. REP. NO. 542, 97TH CONG., 2D SESS. (1982) 10

Joint hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. (1924)..... 10

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) 4

Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. REV. 991 (2002) 13

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) 14

WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1..... 10

JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (J. Gould 10th rev. ed. 1892) 4

Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001) 14

STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) 3

Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977) 3

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed amicus briefs in numerous cases to raise issues of vital concern to the nation's business community.

Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those agreements. They utilize arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. Many of those advantages would be forfeited if, as the court below held, the class action device may be superimposed on arbitration. Amicus therefore has a strong interest in urging this Court to reverse the decision below.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus concurs in petitioner's arguments that the Federal Arbitration Act ("FAA") precludes courts from imposing class-wide arbitration on parties that never agreed to such a procedure. Rather than repeat those arguments, this brief addresses a contention that we anticipate respondents and their

---

[1] Pursuant to Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the amicus curiae, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

amici will raise — that arbitration agreements that either implicitly or explicitly preclude consumers from pursuing class-wide relief are inherently unconscionable and that superimposition of class action procedures is therefore a necessary precondition to enforcement of consumer arbitration provisions. As discussed below, class-wide actions for damages represent a relatively recent and waivable procedural device. The inability of an arbitral party to demand such a procedure cannot then be fundamentally unfair or unconscionable.

Furthermore, class action procedures are not needed to prevent arbitration from being unfair to respondents and other consumers. We describe below how contracting parties can and do protect against any risk that unavailability of the class action device will discourage valid but small claims, as well as how arbitral institutions have removed any financial obstacles to the filing of such claims. We further show that class actions are not needed to attract claimants' attorneys, given the greater availability of awards of attorneys' fees and extra-contractual damages in arbitration than in court.

Finally, we explain why mandating class procedures actually would undermine the very benefits of arbitration that lead parties to enter into arbitration agreements in the first place — inexpensive, streamlined, and expeditious dispute resolution. A procedure that would undermine these goals cannot possibly be an indispensable prerequisite to enforcement of an agreement to arbitrate.

ARGUMENT

I. THE MONETARY CLASS ACTION IS A RECENT INNOVATION THAT IS NOT SO FUNDAMENTAL THAT ITS UNAVAILABILITY CAN BE DEEMED TO RENDER AN ARBITRATION PROVISION UNCONSCIONABLE

Precluding class-wide resolution of disputes is not inherently unfair or unconscionable. The ability to obtain money

damages in a class action is a relatively recent development, and the type of representative actions historically available in equity differed fundamentally from modern class actions. A procedure of such recent vintage cannot be so fundamental that its unavailability would make an arbitration agreement unconscionable.

The modern class action is "something out of the ordinary, an essentially new turn in legal events." Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977). Although legal historians at one time viewed the modern class action as a descendant of representative actions in seventeenth-century English chancery, more recent research shows those representative actions to have been more like "archaic remnants of a medieval social and litigative structure" than forerunners of the modern class action. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 136 (1987). "Seventeenth-century group litigation is not about the legal rights of aggregated individuals but about the residual incidents of status flowing from membership in agricultural communities poised at the edge of a market economy." *Ibid.* Notably, "none" of those group cases involved "actions for money damages." *Id.* at 135. Even today, damages are not available in representative actions in England except in limited circumstances. See Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249, 253 (2001).

In the United States, what we now think of as class actions did not exist until relatively recently. This Court's initial rules of practice for federal courts of equity, promulgated in 1822, did not contain *any* provisions for class actions. See 20 U.S. (7 Wheat.) xvii-xxi (1822). In practice, representative suits were available only as a limited exception to the "necessary parties" rule in equity and could not be relied on to bind absent parties. See *Ortiz* v. *Fibreboard Corp.*, 527

U.S. 815, 832 (1999); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 97 (J. Gould 10th rev. ed. 1892). These limitations largely remained after this Court provided for "group representative litigation" in Equity Rule 48, 42 U.S. (1 How.) xli, lvi (1843), followed by "Representatives of Class" in Equity Rule 38, 226 U.S. 630, 659 (1913). See *Wabash R.R.* v. *Adelbert College*, 208 U.S. 38, 58-59 (1908); *Christopher* v. *Brusselback*, 302 U.S. 500, 505 (1938). Even the original version of Federal Rule of Civil Procedure 23, promulgated in 1937, did little to promote the use of class actions, in part because the circumstances in which absent parties would be bound by a class action ruling remained unclear. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 381 (1967).

"[M]odern class action practice emerged in the 1966 revision of Rule 23" (*Ortiz*, 527 U.S. at 833), which gave federal court class actions their "current shape" (*Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997)). Revised Rule 23's "most adventuresome innovation" was its authorization of "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614. For most of its history, then, our legal system did not provide for class-wide resolution of individual claims, and class actions for damages of the type so prevalent today took shape only 37 years ago. Such a recent innovation can hardly be deemed *essential* to prevent dispute resolution procedures from being unconscionable, even if it is a *desirable* litigation option in the circumstances specified by Rule 23.

Furthermore, the right to a class action is "merely a procedural one, * * * that may be waived," confirming that its absence does not in itself render a proceeding unfair. *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). Hence, permitting parties to exercise that waiver by choosing a different procedure to resolve their disputes —

individual arbitration — cannot be fundamentally unfair or unconscionable. Just as parties to an arbitration agreement may "stipulate to whatever procedures they want" (*Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994)), they may agree to exclude remedies and procedures they *don't* want, such as punitive damages (see *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-60 (1995)) and class actions.[2]

The opportunity for parties mutually to determine procedures to resolve their disputes is in large part what distinguishes private arbitration from courtroom litigation. Whereas the parties to an action in federal court cannot es-

---

[2] Numerous federal and state courts have held that there is nothing unconscionable about arbitration provisions that exclude class actions. *E.g*, *Lloyd* v. *MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir.), cert. denied, 123 S. Ct. 695 (2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *Lomax* v. *Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076-1077 (C.D. Cal. 2002); *Vigil* v. *Sears Nat'l Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002); *Pick* v. *Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001); *Zawikowski* v. *Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Rains* v. *Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown* v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 n.23 (Haw. 1996); *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1270-1271 (Wash. Ct. App. 2001).

Recently, the Ninth Circuit concluded that class action bans in standard form arbitration agreements are "manifestly one-sided" by their very nature and hence are inherently unconscionable. *Ting* v. *AT&T*, 2003 WL 292296, at *20 (9th Cir. Feb. 11, 2003) (internal quotation marks and alterations omitted). The present case is an appropriate vehicle for dispatching that shibboleth.

cape the federal rules governing discovery, evidence, and appeals, by agreeing to arbitrate they intentionally relinquish "the procedures and opportunity for review of the courtroom." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, what is an arbitration agreement but a waiver of the right to a trial by jury, a right with a far richer pedigree than anything in Rule 23? Yet, it is well established that arbitration agreements are not unenforceable merely because they waive the right to a jury trial. *E.g.*, *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-481; *American Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 710-711 (5th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003). By the same token, agreements to resolve disputes through individual arbitration rather than class action procedures cannot be deemed unconscionable and thus unenforceable. This Court's ruling in *Gilmer* — that a statute expressly authorizing claims on behalf of "other employees similarly situated" did not preclude agreements mandating "individual attempts at conciliation" — cannot be reconciled with any notion that such mandates are *per se* unconscionable. 500 U.S. at 32 (internal quotation marks omitted).

At bottom, the court below is seeking to substitute its own view of procedural fairness for Congress's decision to leave the details of arbitral procedures to the parties. But "unless and until Congress authorizes class certification for purposes of arbitration, [courts] are without the authority to impose it." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 278 (7th Cir. 1995) (Rovner, J., concurring).

II. ARBITRAL CLASS ACTIONS ARE NOT NECESSARY TO VINDICATE THE RIGHTS OF CONSUMERS

Even if the absence of class action procedures could render an arbitration agreement unconscionable in some circumstances, it is quite another matter to hold that precluding class action arbitrations is always unconscionable. Class action

procedures are not needed to protect the rights of consumers. Other protections are available that, unlike class actions, comport with arbitration's consensual framework.

This Court previously has rejected an argument that the costs of arbitrating make individual consumer arbitration agreements inherently unconscionable. *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 91-92 (2000). It instead made clear that whether individual arbitration is prohibitively costly is a case-by-case question. *Ibid.* The answer to that question will vary depending on the claimant's circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement. Since then, the courts of appeals have been fleshing out the precise contours of the claimant's burden to prove that arbitration would be prohibitively expensive. See, *e.g.*, *Morrison* v. *Circuit City Stores, Inc.*, 2003 WL 193410 (6th Cir. Jan. 30, 2003); *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001).

One plainly important factor is whether, and if so how, the applicable arbitration agreement allocates arbitral costs and fees. Many companies have been experimenting with a variety of cost allocation mechanisms to ensure that filing fees and costs do not present an obstacle to the filing of valid claims. For example, one company's arbitration agreement commits it to advance the remainder of arbitration costs after the claimant pays or obtains a waiver of the $75 filing fee. See *Luong* v. *Circuit City Stores, Inc.*, 2001 WL 935317 (C.D. Cal. Mar. 28, 2001). In addition, one of the Chamber's members has drafted an arbitration provision under which it undertakes to reimburse the plaintiff for the filing fee, pay the full costs of arbitration, and, if the plaintiff prevails in the arbitration, reimburse his or her attorneys' fees. Another Chamber member offers to pay all but $100 of the cost of arbitration if the consumer agrees to mediate the dispute prior to arbitrating. Such provisions substantially reduce (if not

entirely eliminate) any financial barrier facing an arbitral claimant.

Furthermore, the costs of consumer arbitration have been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 755 (2001). The American Arbitration Association ("AAA") caps a consumer's responsibility for arbitrator fees at $125 on claims of $10,000 or less, provides for fee waivers or deferrals in hardship cases, and makes arbitrators available to conduct hearings on a pro bono basis. See *Supplementary Procedures for the Resolution of Consumer-Related Disputes and Administrative Fee Waivers and Pro Bono Arbitrators Services*, available at http://www.adr.org. Other arbitral institutions have similar provisions, as noted by Justice Ginsburg in her opinion concurring in part and dissenting in part in *Green Tree*, 531 U.S. at 95 & n.2.

With such contractual and institutional protections available, there is no need to impose class action procedures on arbitration to protect consumers. Nor is there any reason to think that individual arbitration will "choke off the supply of lawyers willing to pursue claims." *Johnson*, 225 F.3d at 374. Many of the statutes on which consumers base their claims provide for exemplary damages, costs, and attorneys' fees to a prevailing claimant (*e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1640(a)(2), (3)), and, absent agreement of the parties to the contrary, arbitrators have the same authority as courts to award such relief. See *AAA Consumer Due Process Protocol, Statement of Principles of the National Consumer Disputes Advisory Committee, Principle 14. Arbitral Remedies*, available at http://www.adr.org (arbitrators may offer "whatever relief would be available in court under law or in equity"). Indeed, arbitrators have far *greater* flexibility than courts to provide relief on consumer claims. For example, AAA Commercial Arbitration Rule 45 permits an award of "any remedy or relief," including attorneys' fees and costs,

whereas courts generally may not award exemplary damages for breach of contract or attorneys' fees without specific contractual or statutory authority. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (discussing "American Rule" on attorneys' fees); *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2102 (2002) ("punitive damages * * * are generally not available for breach of contract"). The availability of attorneys' fees and extra-contractual damages in individual arbitrations provides plenty of incentive for lawyers to pursue valid claims and confirms that class-wide proceedings are not required to ensure vindication of consumer rights.

Finally, respondents or their amici may argue that class actions must be made available to deter misconduct. As this Court has recognized, however, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and [its] deterrent function." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This Court has rejected arguments that statutory rights are less likely to be vindicated in individual arbitration than in court. *E.g.*, *id.* at 634. Moreover, state and federal agencies designated to protect consumers "possess sufficient sanctioning power to provide a meaningful deterrent." *Johnson*, 225 F.3d at 369; see also *Gilmer*, 500 U.S. at 32 (relying on EEOC's broad authority to protect consumers); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 233 (1987) (same with respect to SEC). Consumers may submit complaints to the FTC by phone at 1-877-FTC-HELP or online at http://www.ftc.gov/ftc/consumer. htm, and state agencies generally are at least as readily available to respond to consumer complaints of misconduct.

III. IMPOSING CLASS ACTIONS ON ARBITRAL PARTIES WOULD UNDERMINE THE BENEFITS OF ARBITRATION

Imposing class action procedures absent agreement of the parties not only would conflict with the consensual basis of arbitration but also would undermine the benefits of arbitration for which the parties did contract.

Section 2 of the FAA makes pre-dispute arbitration agreements "valid, irrevocable, and enforceable" because, as one of its framers explained, "arbitration saves time, saves trouble, saves money." Joint hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. 7 (1924) (Statement of Charles Bernheimer, N.Y. Chamber of Commerce). Congress later elaborated, noting that arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling." H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982). More recently, Congress reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186. This Court, too, has recognized the superior "simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. It cannot be inherently unfair or unconscionable to preclude use of a procedural device that would destroy these arbitral benefits. Yet that is precisely what would result from imposing class action procedures on arbitration.

Arbitration is particularly "helpful to individuals" because it is "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280-281 (1995). It is less expensive in large part because it resolves disputes more quickly. In contrast to the "law's delay" (WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1), the average

length of an AAA arbitration from filing to award is less than six months. *Allied-Bruce*, 513 U.S. at 280 (citing AAA Amicus Brief). Arbitration expedites dispute resolution and otherwise reduces costs by eliminating or significantly reducing pre-hearing motion practice and discovery — summary judgment and depositions are rare — and by severely limiting the bases for appeal.

In contrast, class actions take years. In the Bazzles' case, involving relatively straightforward issues, well over three years elapsed between their motion for class certification and the arbitrator's award. Pet. 7. Certification of a class, whether in court or arbitration, requires notice to potential class members and inquiry into such issues as the adequacy of the purported representatives, conflicts within the proposed class, the commonality of issues of fact and law, and manageability.

The certification process would be far from the only source of costly delays. The streamlined procedures traditionally associated with arbitration would not suffice or be tolerated if defendants faced liability on thousands or even millions of claims in one proceeding. The two arbitration awards in this case, involving relatively modest-sized classes, totaled nearly $27 million. With so much at stake, arbitrator selection would demand as many resources as jury selection does in big court cases. Arbitration's simplicity and informality would become a thing of the past, as big teams of lawyers engage in elaborate motion practice and searching discovery. Arbitral finality would be replaced by endless appeals. To prepare for those appeals, parties would have to arrange for transcription of hearings and request written opinions (instead of the usual bare-bones awards), driving up costs and arbitrator fees.

The transaction costs of drafting arbitration agreements also would increase dramatically. Under the current default rule recognized by *Champ* and other federal and state courts

(see Pet. 15-19), class action arbitrations are precluded unless the parties expressly authorize them. Because this presumption in favor of individual arbitration comports with the expectations of parties who choose arbitration for its speed, low cost, and informality, costly negotiations to modify the default rule and authorize class procedures are rare. Instead, parties freely employ the "generic" arbitration clause recommended by the AAA and other arbitral institutions.

If class action and other judicial procedures were to become the default, as the court below and respondents would have it, these ready-to-go arbitration clauses would no longer be acceptable to many parties. Instead, lengthy negotiations over whether to exclude specific procedures, including class actions, would become the norm. Parties likely to be on the receiving end of any class action claims would seek additional protections, such as three-member panels and heightened judicial review standards, further protracting and adding to the expense of negotiations. Consumers would pay the price if arbitration were to become more like litigation and laden with costly procedures. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers).

The detrimental impact of imposing class action procedures on arbitration would extend beyond cost. The privacy offered by individual arbitration — with no media coverage, a presumption of confidentiality, and unpublished awards — would be all but impossible to maintain in the frenzied atmosphere of a high-stakes class proceeding. The flexibility to tailor proceedings to parties' schedules and avoid disruption to one's business also would go by the boards in arbitrations involving so many claims.

The control that parties now have over the shape of arbitral proceedings also is threatened. Parties now may agree on virtually every aspect of an arbitration, from scope of discovery to admissibility of evidence to the nature of witness testimony to the site of the hearing. In class actions, which "tend to be run by, and for the benefit of, the plaintiffs' attorneys," individual claimants would have to cede their control to class action lawyers. Drahozal, *"Unfair" Arbitration Clauses*, *supra*, at 754. It is no secret that class action attorneys often put their own interests ahead of those of class members, as in "coupon" settlements that provide little benefit to anyone but lawyers. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. REV. 991, 993 (2002) ("In contrast to the class members, [the] class counsel are paid in cash.").

Moreover, class-wide arbitration, as courts advocating it have recognized, "would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating* v. *Superior Court*, 183 Cal. Rptr. 360, 377 (Cal. 1982), rev'd on other grounds sub nom. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). Courts would become heavily involved, not only because so much is at stake, but also because absent class members must be protected. "In the class action, because of manageability problems, the potential for abuse, and the need to protect absentees, judicial control is both more explicit and more pervasive." *Developments in the Law – Class Actions*, 89 HARV. L. REV. 1318, 1389 (1976).

It is no answer to say that arbitrators can supervise class actions as readily as courts. In many respects, arbitral authority is limited. The permissible scope of arbitral subpoenas, for example, is a controversial issue on which the courts are divided. Compare *In re Security Life Ins. Co.*, 228 F.3d 865, 870-871 (8th Cir. 2000) (arbitral subpoenas are enforceable against third parties) with *COMSAT Corp.* v. *National Science Found.*, 190 F.3d 269, 270 (4th Cir. 1999) (arbitral subpoenas are not enforceable against third parties). Furthermore, arbitrators are generally paid by the hour or day or

by the amount at issue and thus, unlike judges, may have a financial incentive to expand the scope of proceedings before them, leading to certifications of inappropriate classes. Courts inevitably would be called on to keep arbitrators in check. Such judicial involvement would multiply proceedings, generate attorneys' fees, and "impose[] costs on consumers." Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001). As this Court has explained, constructions of the FAA that foster the "costs and delay" of litigation should be avoided as inconsistent with the goals of arbitration. *Allied-Bruce*, 513 U.S. at 281.

Just as significant, class actions would deprive parties of a full opportunity to present their case. Unhampered by broad discovery and dispositive motion practice, arbitration offers a virtual "guarantee that there will be a hearing on the merits," in contrast to litigation where few claimants "survive the procedural hurdles necessary to take a case to trial." *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.2d 1465, 1488 (D.C. Cir. 1997). Consumers and other individuals generally benefit from this opportunity to present their case fully. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-47 (1998) (individuals are four times more likely to prevail in arbitration than in litigation). That opportunity will be lost if class actions, and the "intense pressure to settle" they impose on defendants, replace individual arbitrations. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As the Third Circuit has noted, class actions often lead to "lower" recoveries for consumers than individual proceedings. *Johnson*, 225 F.3d at 374. By the same token, arbitration may provide the only realistic opportunity for business defendants to obtain a ruling on the merits rather than being subjected to the inexorable pressure to settle that results from judicial certification of a class.

The loss or reduction of all of these benefits would correspondingly reduce parties' incentives to agree to arbitrate disputes in the first place. If firms are subject to class actions whether they litigate or arbitrate, many will choose to litigate to obtain the greater procedural protections available in court, including effective appellate review. Selecting the reduced formalities of arbitration would be hard to justify with tens of millions of dollars worth of claims subject to resolution at one fell swoop.[3]

Thus, the actual result of upholding the court below would not be fairer or more efficient arbitration — but rather *more litigation* and *less arbitration*. Respondents and their amici seek not to improve arbitration but to destroy it by imposing procedures suitable only for litigation. They thereby hope to move the resolution of consumer disputes out of arbitration and into the courts. At bottom, it is arbitration itself, not lack of class procedures, they find unconscionable. Congress rejected that viewpoint by making agreements to arbitrate individually "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This Court should reject respondents' effort to resurrect the centuries-old "suspicion of arbitration" that Congress sought to bury decades ago (*Gilmer*, 500 U.S. at 30), reaffirm the validity and value of individual arbitration, and prevent the courts from being deluged with consumer disputes that the parties contractually agreed to resolve privately.

---

[3] The threat of class action arbitrations may make foreign parties particularly hesitant to enter into agreements calling for arbitration in the United States. Our research has located no foreign jurisdiction that permits class action arbitrations. See *Mitsubishi*, 473 U.S. at 631 (imposing U.S. standards on arbitration would "'imperil the willingness and ability of businessmen to enter into international commercial agreements'") (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 517 (1974)).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

FEBRUARY 2003

(17)

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP.
A/K/A GREEN TREE ACCEPTANCE CORP.
A/K/A GREEN TREE FINANCIAL SERVICES CORP.
N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE,
IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS
AND FOR ALL OTHERS SIMILARLY SITUATED,
DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS
AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF *AMICUS CURIAE* DIRECTV, INC. IN SUPPORT OF PETITIONER

DALE H. OLIVER
MICHAEL E. WILLIAMS
TIFFANY C. GRAHAM
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
865 S. Figueroa St.
Los Angeles, CA 90017

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000

MICHAEL E. BAUMANN
ANDREW E. PARIS
REBECCA J. WAHLQUIST
KIRKLAND & ELLIS
777 S. Figueroa St.
Los Angeles, CA 90017

February 24, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

ARGUMENT 2

I. THE FAA DOES NOT ALLOW COURTS TO INVOKE A PUBLIC POLICY FAVORING CLASS ACTIONS TO OVERRIDE THE EXPRESS TERMS OF AN ARBITRATION AGREEMENT 2

II. INTERPRETING THE FAA TO AUTHORIZE CLASSWIDE ARBITRATION ABSENT AN EXPRESS AGREEMENT WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS ... 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 7

American Centennial Ins. Co. v. National Cas. Co.,
951 F.2d 107 (6th Cir. 1991) 5

Baesler v. Continental Grain Co.,
900 F.2d 1193 (8th Cir. 1990) 5

Baravati v. Josephthal, Lyon & Ross, Inc.,
28 F.3d 704 (7th Cir. 1994) 3

Bazzle v. Green Tree Fin. Corp.,
351 S.C. 244 (2002) 10

Bernhard v. Polygraphic Co. of Am.,
350 U.S. 198 (1956) 10

Blue Cross v. Superior Ct.,
67 Cal. App. 4th 42 (2d Dist. 1998) 4, 6

Boucher v. Syracuse Univ.,
164 F.3d 113 (2d Cir. 1999) 11

Champ v. Siegel Trading Co., Inc.,
55 F.3d 269 (7th Cir. 1995) 4, 7

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 3

Del E. Webb Constr. v. Richardson Hosp. Auth.,
823 F.2d 145 (5th Cir. 1987) 5

Discover Bank v. Boehr,
105 Cal. App. 4th 326 (2d Dist. 2003) 10

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 6

Dominium Austin Partners, L.L.C. v. Emerson,
248 F.3d 720 (8th Cir. 2001) 4

Edward J. DeBartolo Corp. v.
Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 9

Garcia v. DIRECTV, Inc.,
No. B158570 (Cal. Ct. App. Dec. 11, 2002) 4

General Tel. Co. v. Falcon,
457 U.S. 147 (1982) 8

General Tel. Co. v. Falcon,
457 U.S. 147 (1982) 8

Government of the United Kingdom v. Boeing Co.,
998 F.2d 68 (2d Cir. 1993) 5

Hansberry v. Lee,
311 U.S. 32 (1940) 8

Hires Parts Serv. v. NCR Corp.,
859 F. Supp. 349 (N.D. Ind. 1994) 12

Iowa Grain Co. v. Brown,
171 F.3d 504 (7th Cir. 1999) 4

Jones v. United States,
529 U.S. 848 (2000) 9

Keating v. Superior Ct.,
31 Cal. 3d 584 (1982),
rev'd on other grounds sub nom.
Southland Corp. v. Keating,
465 U.S. 1 (1984) 3, 7

Lapine Tech. Corp. v. Kyocera Corp.,
130 F.3d 884 (9th Cir. 1997) 10

Mandel v. Household Bank (Nevada) Nat'l Ass'n,
105 Cal. App. 4th 75 (4th Dist. 2003) 6

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 3

Mitsubishi Motors Corp. v. Soler Chryler-Plymouth, Inc.,
473 U.S. 614 (1985) 6

Moncharsh v. Heily & Blase,
3 Cal. 4th 1 (1992) 9

Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 3

New England Energy, Inc. v. Keystone Shipping Co.,
855 F.2d 1 (1st Cir. 1988) 5

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 8

Pike v. Freeman,
266 F.3d 78 (2d Cir. 2001) 8

Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.,
873 F.2d 281 (11th Cir. 1989) 5

Schlessinger v. Rosenfeld, Meyer & Susman,
40 Cal. App. 4th 1096 (2d Dist. 1995) 8

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 2

Southland Corp. v. Keating,
465 U.S. 1 (1984) 3, 4

Sovak v. Chugai Pharm. Co.,
280 F.3d 1266 (9th Cir. 2002) 9

Szetela v. Discover Bank,
97 Cal. App. 4th 1094 (4th Dist. 2002) 5

Ting v. AT&T,
___ F.3d ___, 2003 WL 292296
(9th Cir. Feb. 11, 2003) 5, 6

Volt Info. Sciences, Inc. v.
Board of Trs. of the Leland Stanford Jr. Univ.,
489 U.S. 468 (1989) 3, 4

Weyerhaeuser Co. v. Western Seas Shipping Co.,
743 F.2d 635 (9th Cir. 1984) 5

Constitutions, Statutes, and Rules

9 U.S.C. §§ 10, 11 ..... 9, 10

Cal. Civ. Proc. § 1282.2(d) 8

Fed. R. Civ. P. 23(c)(1) 11

S. Ct. R. 37.3 1

S. Ct. R. 37.6 1

Other Authorities

Commercial Rules of Am. Arb. Assoc. (2003) 12

S. Rep. No. 536, 68th Cong.,
1st Sess., 3 (1924) 7

Sternlight, Jean R.,
As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,
42 Wm. & Mary L. Rev. 1 (2000) 11

Waltchter, Daniel R.,
Classwide Arbitration and 10B-5 Claims in the Wake of Shearson/ American Express, Inc. v. McMahon,
74 Cornell L. Rev. 380 (1989) 11

INTEREST OF THE *AMICUS*[*]

Amicus DIRECTV, Inc., is a California corporation that provides digital satellite television services nationwide. A network of independent retailers sell DIRECTV-compatible reception equipment and promote DIRECTV's services to individuals and businesses who then contract with DIRECTV. Each of these retailers has a Sales Agency Agreement with DIRECTV outlining the rights and responsibilities of both parties to the contract. That Agreement includes an arbitration clause that requires the parties to arbitrate according to the procedures of the Federal Arbitration Act ("FAA"), which do not provide for classwide arbitration.

Some of the independent retailers, however, are seeking to arbitrate their claims against DIRECTV on a classwide basis. And, like the court below, state courts in California and Oklahoma have invoked a public policy favoring class actions to subject DIRECTV to potential classwide arbitration even though DIRECTV never agreed to such a procedure. By thus invoking state public policy to override the parties' contractual freedom to arbitrate according to the terms of their agreement, these courts (like the court below in this case) have undermined the letter and spirit of the FAA. Accordingly, DIRECTV supports reversal of the South Carolina Supreme Court's decision in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FAA requires both federal and state courts to enforce arbitration agreements according to their terms. Where parties have agreed that their arbitration will be governed by the FAA, which does not provide for class actions, courts are not free to override that agreement by invoking a state public policy favoring

---

[*] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus*, its counsel, or its insurer made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

class actions. A state policy invalidating arbitration agreements unless they authorize class actions is not a state policy of general applicability, but a policy specifically directed at arbitration, and hence preempted by the FAA.

This straightforward application of FAA preemption is only underscored by the due process implications of classwide arbitration. Class actions are an exception to the general rule that parties represent themselves in a legal dispute, and that exception has been upheld in the courtroom context only in light of procedural rules that carefully limit the use of the class action mechanism. Those procedural rules are inapplicable in the arbitration context, thereby raising serious due process concerns where the parties have not agreed to proceed in this manner. Nor is it feasible to address these concerns through a hybrid court-arbitration procedure, which effectively saddles parties with the *worst* of both worlds: the complexity and delay of the courtroom without the corresponding procedural protections and appellate rights. DIRECTV's experiences with such hybrid procedures have been decidedly negative, and have deprived DIRECTV of the benefit of its federally protected arbitration agreements.

ARGUMENT

I. THE FAA DOES NOT ALLOW COURTS TO INVOKE A PUBLIC POLICY FAVORING CLASS ACTIONS TO OVERRIDE THE EXPRESS TERMS OF AN ARBITRATION AGREEMENT.

As this Court has often noted, the FAA was enacted "to revers[e] centuries of judicial hostility to arbitration agreements by plac[ing] arbitration agreements upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) (internal quotations and citations

omitted).[1] Accordingly, the Act established a "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), that requires courts to enforce private arbitration agreements "according to their terms," *Volt Info. Sciences, Inc. v. Board of Trs. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("[C]ourts are bound to interpret contracts in accordance with the expressed intentions of the parties."). Parties are thus free to agree to arbitral procedures as formal or informal as they wish, and the FAA requires both federal and state courts to respect and enforce the parties' agreement. *See, e.g., Volt*, 489 U.S. at 479 ("[P]arties are generally free to structure their arbitration agreements as they see fit," and thus may "specify by contract the rules under which that arbitration will be conducted."); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.") (Posner, J.).

Like South Carolina, however, California has flouted this federal policy. Recent California decisions indicate a judicial unwillingness to enforce arbitration agreements to the extent they conflict with California's public policy favoring class actions. This trend began with the California Supreme Court's decision in *Keating v. Superior Ct.*, 31 Cal. 3d 584, 623 (1982), *rev'd on*

---

[1] *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985) ("[The] purpose [of the FAA] was to place an arbitration agreement upon the same footing as other contracts, where it belongs, and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.") (internal quotations and citations omitted); *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) ("[T]he purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.") (internal quotation omitted).

other grounds sub nom. Southland Corp. v. Keating, 465 U.S. 1 (1984), which held that state law authorized classwide arbitration but did not address "the question whether superimposing class action procedures on a contract arbitration was contrary to the [FAA]," *Southland*, 465 U.S. at 8-9. The California Court of Appeal did address that issue in *Blue Cross of Cal. v. Superior Ct.*, 67 Cal. App. 4th 42 (2d Dist. 1998), and held that "when the arbitration agreement between the parties is *silent* as to classwide arbitration and state law specifically authorizes it . . ., an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [FAA]." *Id.* at 60 (emphasis added). According to *Blue Cross*, a state policy requiring classwide arbitration in the absence of an agreement to that effect does not violate the FAA, because such a policy does not "divert a case from arbitration to court," but simply "seeks only to make more efficient the process of arbitrating." *Id.* at 59 (internal quotation omitted).

Subsequent California decisions have relied on *Blue Cross* to impose a public policy favoring classwide arbitration *even where the express terms of the parties' arbitration agreement do not permit classwide treatment*. One such decision is *Garcia v. DIRECTV, Inc.*, No. B158570 (Cal. Ct. App. Dec. 11, 2002), a case brought against *amicus* DIRECTV by several retailers. The agreement between DIRECTV and those retailers not only requires arbitration, but specifies that "[t]his section and any arbitration conducted hereunder shall be *governed by* the United States Arbitration Act," thereby evincing the parties' intent to conduct their arbitration under the FAA's, not California's, procedural rules. *See, e.g., Volt*, 489 U.S. at 470, 479 (interpreting this "governed by" language to refer to the procedural rules applicable to the arbitration). As a matter of federal law, however, the FAA does not permit classwide arbitration unless the parties have expressly agreed to such proceedings. *See e.g., Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999); *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276-77 (7th Cir. 1995).[2] Thus, the *Garcia* court overrode the parties' agreement by insisting that the retailers suing DIRECTV must be allowed to pursue a classwide arbitration. That decision is particularly incongruous in the context of the DIRECTV Agreement, which involves sophisticated commercial parties (DIRECTV and its retailers) on both sides, and thus does not implicate the concern with protecting allegedly aggrieved consumers that underlies California's policy favoring class actions in the first place. *See, e.g., Keating*, 31 Cal. 3d at 609.

Indeed, California courts have refused to enforce arbitration agreements that *specifically preclude* classwide arbitration. In *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (4th Dist. 2002), the court of appeal stated that an express class-action waiver provision in an arbitration agreement is unenforceable because it violates California's public policy favoring class actions. According to *Szetela*, such a provision "contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general." *Id.* Under *Szetela*, parties to a contract in California *cannot* bargain to preclude classwide arbitration, despite the bargaining freedom protected by the FAA. *Id.; see also Ting v.*

---

[2] Similarly, most federal courts have held as a matter of federal law that the FAA does not allow the consolidation of multiple arbitration proceedings absent an express agreement of the parties. *See, e.g., Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *but see New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988).

AT&T, ___ F.3d ___, 2003 WL 292296, at *19-22 (9th Cir. Feb. 11, 2003); *Mandel v. Household Bank (Nevada) Nat'l Ass'n*, 105 Cal. App. 4th 75 (4th Dist. 2003).

The analysis of these courts is based on the faulty premise that state courts are free to rewrite arbitration agreements as long as they invoke a doctrine of general applicability, like unconscionability. *See, e.g., Blue Cross*, 67 Cal. App. 4th at 50-51; *Szetela*, 97 Cal. App. 4th at 1099-1100; *Ting*, 2003 WL 292296, at *20-22 & n.15. But the use of the unconscionability doctrine to amend arbitration agreements to authorize class actions where the parties have not done so is not arbitration-neutral. To the contrary, it reflects a state policy mandating a particular type of arbitration procedure *notwithstanding* the contracting parties' wishes. The FAA does not allow States to regulate arbitration in this manner, regardless of whether they purport to impose such regulation through the rubric of a general doctrine like unconscionability. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (FAA preempts state law requiring notice of arbitration clause in underlined capital letters on first page of contract); *Mastrobuono*, 514 U.S. at 58 ("[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration*.") (emphasis modified). What matters is not the legal *label* placed on the state law or policy, but whether that law or policy is specific to arbitration. Were the law otherwise, States would be free to thwart arbitration at will by simply invalidating any disfavored arbitration provision as unconscionable.

Indeed, allowing States to rewrite arbitration agreements in this manner would allow States to undermine arbitration itself. The whole point of arbitration is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*

Corp. v. Soler Chryler-Plymouth, Inc., 473 U.S. 614, 628 (1985). That trade-off is attractive not just to large corporate defendants, but to plaintiffs as well: "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind. *See* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). That trade-off breaks down, however, to the extent that arbitration proceedings start to mimic the complexity of courtroom proceedings. *See, e.g., Keating*, 31 Cal. 3d at 623 (Richardson, J., concurring and dissenting) ("[C]lass procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal."). Parties forced into involuntary classwide arbitration thus get the *worst* of both worlds: the complexity and delay of class-action litigation, without the accompanying procedural safeguards and meaningful appellate review. Parties may be willing to bear the risk of arbitrator error in an individual case, assuming that over time errors favoring one side or the other will neutralize each other in the aggregate, but the impact of an error in a class arbitration is multiplied by the number of class members.

Because a state policy mandating classwide arbitration absent an express agreement to that effect "would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration" than they had bargained for, *Champ*, 55 F.3d at 275 (internal quotation and brackets omitted), the FAA preempts such a policy.

II. INTERPRETING THE FAA TO AUTHORIZE CLASSWIDE ARBITRATION ABSENT AN EXPRESS AGREEMENT WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

The conclusion that the FAA does not allow the States to mandate classwide arbitration absent an express agreement follows not just from the text of the FAA itself, but also from underlying constitutional concerns. Class actions are a "recognized exception" to the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) ("The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.") (internal quotation omitted). Because the class-action device raises serious due process concerns, *both* with respect to the party forced to litigate against the class *and* with respect to absent class members, the Federal Rules of Civil Procedure and analogous state procedural rules have been carefully construed to ensure "minimal procedural due process protection" in class actions. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

The procedural protections of these rules, however, do not apply in arbitration absent an explicit agreement of the parties. *See Pike v. Freeman*, 266 F.3d 78, 92 n.17 (2d Cir. 2001) ("Federal Rules of Civil Procedure do not apply in arbitrations before the American Arbitration Association."); Cal. Civ. Proc. § 1282.2(d) ("rules of judicial procedure need not be observed" in an arbitration); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 1108 (2d Dist. 1995) (same). Thus, there is no structural mechanism in arbitration to protect the unique due process concerns presented by class actions. That is not a problem with arbitration, which is a vital tool for dispute resolution; rather,

it is a problem with engrafting class action procedures onto arbitration agreements absent the parties' express consent. To be sure, parties *can* agree to waive their due process rights by agreeing to arbitration. But there is no reason for courts to presume that they *have* done so; to the contrary, the serious due process implications of class actions warrant construing the FAA not to authorize classwide arbitration absent the express agreement of the parties. It is elementary that courts should construe statutes to avoid, rather than precipitate, constitutional questions. *See, e.g., Jones v. United States*, 529 U.S. 848, 857-58 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The foregoing due process concerns are only heightened by the lack of effective judicial review of arbitration awards. Such review is sharply circumscribed for the very purpose of preserving the efficiency and finality characteristic of arbitration. *See, e.g., Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10 (1992). While the precise rules vary by jurisdiction, arbitration awards are generally difficult to overturn even for clear error. In California, even an unjust award is not subject to review: "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." *Id.* at 6.

In the federal system, the FAA supplies the standards for judicial review of arbitral awards. An award may be vacated or modified where procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitrators improperly refused to hear material evidence or postpone the hearing; where the arbitrators exceeded their powers; or where there was an evident miscalculation or mistake. 9 U.S.C. §§ 10, 11. The Ninth Circuit has described such review as "extremely narrow . . . If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." *Sovak v. Chugai Pharm. Co.*, 280

F.3d 1266, 1271 (9th Cir. 2002) (citations omitted); *see also Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) ("[A] federal court may vacate or modify an arbitration award only if that award is 'completely irrational,' exhibits a 'manifest disregard of law,' or otherwise falls into one of the grounds set forth in 9 U.S.C. §§ 10 or 11.") (internal quotation omitted).

In a classwide arbitration, these deferential standards of review could easily lead courts to uphold plainly incorrect and unjust decisions. Indeed, in this very case, the South Carolina Supreme Court refused to modify its standards of review or subject to serious scrutiny the arbitrators' $27 million award to 3,700 class members. *See Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 266-67 (2002) (upholding award where no showing of "manifest disregard for the law" and noting that while the standard for appellate review of a court's class certification decision is abuse of discretion, the review of an arbitral award is "far more limited."); *see also Discover Bank v. Boehr*, 105 Cal. App. 4th 326, 348 (2d Dist. 2003) ("[A] multi-million dollar class arbitration award entered on nothing more than mere whim cannot be corrected under California law."). It goes without saying that an error in a classwide arbitration proceeding is far more prejudicial to the defendant than an error in an ordinary individual arbitration proceeding. Defendants should not be forced to defend against classwide claims in arbitration where they have not agreed to do so, and forcing defendants to do so would violate the due process rights of both defendants themselves and the absent class members.

The due process risks of class arbitrations cannot be solved by simply engrafting "due process" judicial oversight onto the established deferential procedures. More fundamental changes would be necessary. Arbitrators need not preserve a transcript of their proceedings or justify their awards with written opinions. *See, e.g., Bernhard v. Polygraphic Co. of Am.*, 350 U.S. 198, 203-04 & n.4 (1956). The potential absence of any record for review

complicates still further the protection of constitutional due process rights. It is apparent that even to begin to ensure due process, courts would need to radically change their arbitration review standards and require arbitrators to preserve records of arbitrations—requirements that will undercut the benefits of arbitration agreements long recognized and protected by this Court. Absent the agreement of the parties, changes of this magnitude should be accomplished only by legislation, not judicial fiat.

To be sure, the due process risk could be minimized if a court retained control of all class action procedures, but only at the expense of the efficiency, cost, and finality that arbitration was supposed to provide in the first place. Thus, academic proposals for courts to assume a greater role in overseeing arbitration class actions are infeasible.[3] In effect, such proposals would create a hybrid judicial-arbitral proceeding, where the parties litigate class issues and arbitrate merits issues—a cumbersome and inefficient procedure at best that derogates the parties' agreement to arbitrate all disputed issues. Presumably, courts in this scenario would be called upon to undertake on ongoing supervisory role over an arbitration, to ensure that a class certification decision is appropriate not just as an initial matter, but on a continuing basis. *See* Fed. R. Civ. P. 23(c)(1); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999).

---

[3] *See, e.g.*, Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 111 (2000) ("Allowing arbitrators on their own to decide [due process issues] simply will not comport with the Due Process Clause."); Daniel R. Waltchter, *Classwide arbitration and 10B-5 Claims in the wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380, 402 (1989) ("In spite of the fact that courts traditionally hesitate to intervene in an arbitral forum, judicial discretion must exist in the classwide arbitration setting if courts are to protect the absent class members' due process rights.").

Amicus DIRECTV knows the downside of such a hybrid proceeding from firsthand experience. In Oklahoma, a state trial court asserted control over the class certification process, imposed a four-month discovery schedule to be followed by a two-day class certification hearing, and effectively suspended the arbitration in the meanwhile. Besides the mere length and expense of the certification litigation, such proceedings often require discovery that goes beyond that allowed under the applicable arbitration rules. Thus, the plaintiffs in the Oklahoma DIRECTV action propounded numerous interrogatories ostensibly seeking "class" discovery—even though the commercial rules of the American Arbitration Association do not permit interrogatories (or depositions) absent agreement of the parties. *See Commercial Rules of Am. Arb. Assoc. (2003)*, R-23 (allowing for exchange of documents only). Yet the avoidance of costly or abusive discovery is often a reason why parties enter into arbitration agreements in the first place. *See Hires Parts Serv. v. NCR Corp.*, 859 F. Supp. 349, 353 (N.D. Ind. 1994). Accordingly, any suggestion that a hybrid court-arbitration proceeding might provide a workable mechanism to "cure" the due process problems with classwide arbitration is illusory.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

DALE H. OLIVER
MICHAEL E. WILLIAMS
TIFFANY C. GRAHAM
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
865 S. Figueroa St.
Los Angeles, CA 90017

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 879-5000

MICHAEL E. BAUMANN
ANDREW E. PARIS
REBECCA J. WAHLQUIST
KIRKLAND & ELLIS
777 S. Figueroa St.
Los Angeles, CA 90017

February 24, 2003

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

ANN ELIZABETH REESMAN
RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. A RULE THAT ALLOWS COURTS TO INCORPORATE CLASS ACTION PROCEDURES INTO AN AGREEMENT THAT IS SILENT AS TO THE AVAILABILITY OF CLASS-WIDE ARBITRATION CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION ACT	8
A. The FAA Requires That a Valid Arbitration Agreement Be Enforced as the Parties Wrote It	8
B. The Predominant View of the Federal Courts of Appeals Is That the FAA Bars Merger of Individual Claims in Arbitration Where the Parties' Agreement Is Silent on the Availability of Class Action Procedures	9
II. THIS COURT'S RULING IN *GILMER* RECOGNIZES THE RIGHT OF PRIVATE PARTIES TO WAIVE JUDICIAL PROCEDURES IN FAVOR OF ARBITRATION OF INDIVIDUAL DISPUTES	12

TABLE OF CONTENTS—Continued

Page

III. PERMITTING INDIVIDUALS SUBJECT TO PRIVATE ARBITRATION AGREEMENTS TO PURSUE CLAIMS ON A CLASS-WIDE BASIS DEFEATS MOST, IF NOT ALL, OF THE PRACTICAL ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATING EMPLOYMENT DISPUTES 14

A. Arbitration Enables Parties To Resolve Disputes More Quickly and More Efficiently Than Litigation 14

B. Class Action Procedures Impose a Level of Complexity and Acrimony That Is Antithetical to the Unique Nature of Employment Arbitration 16

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 16

Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 6, 9, 10, 12

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 3, 7, 14

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) 15

Culver v. City of Milwaukee, 277 F.3d 908 (7th Cir. 2002) 18

Dean Witter Reynolds, Inc. v. Boyd, 470 U.S. 213 (1985) 6, 9

Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001) 6, 10

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 3, 8, 13

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*

Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) 3, 8

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 17

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) ..... *passim*

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 12

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 8

Randolph v. Green Tree Fin. Corp., 244 F.3d 814 (11th Cir. 2001) 6, 10, 11

TABLE OF AUTHORITIES—Continued

Page

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000), *cert denied*, 532 U.S. 919 (2001) 16

Volt Info. Serv., Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 13

STATE CASES

Bazzle v. Green Tree Fin. Corp., 569 S.E. 2d 349 (S.C. 2002) ..... *passim*

FEDERAL STATUTES

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq* 2

Americans with Disabilities Act,
42 U.S.C. § 12111-12117 2
42 U.S.C. § 12201-12213 2

Federal Arbitration Act,
9 U.S.C. § 1 ..... 5, 6, 8
9 U.S.C. § 2 8
9 U.S.C. § 4 9

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 2

OTHER AUTHORITIES

Administrative Office of the United States Courts, *The Third Branch*, Vol. 34, No. 5 (Apr. 2002) 14, 15

Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. Rev. 305 (2001) 17, 18

TABLE OF AUTHORITIES—Continued

Page

Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 15 The Labor Lawyer [A.B.A. Sec. Lab. & Emp. L.] 415 (2000) 17

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) 15

Table C-5, Administrative Office of the United States Courts (July 1, 2001-June 30, 2002) 14

Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) 7, 15

IN THE

Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Petitioner Green Tree Financial Corporation.[1] The written consent of all parties has been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, 12201-12213, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties the ability to establish procedures under which any future disputes will be governed. It follows, then, that such agreements must be enforced according to their express terms so as to give meaning to the parties' intent.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the universal guiding principles of common contract, as well as federal statutory law, the court below improperly permitted two cases to proceed in arbitration using class-type proceedings, culminating in class-wide relief, where the parties' agreement to arbitrate was silent on the availability of class action procedures. In so doing, the court inexcusably failed to give effect to the terms of the arbitration agreement as written. Although the instant case involves arbitration of commercial disputes, the Court's decision is likely to be construed as applying to arbitration of employment disputes as well.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and others supporting the enforceability of private agreements to arbitrate.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Green Tree Financial Corporation n/k/a Conseco Finance Corporation (Green Tree) is a consumer finance company in the business of providing, among other things, retail home equity mortgages, home improvement loans and consumer loans for manufactured housing. *www.conseco.com*. Respondents Lynn and Burt Bazzle (the Bazzles) executed a home improvement financing agreement with Green Tree, which contained a contractual provision

---

[2] *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House*, 534 U.S. 279 (2002).

requiring any claims or disputes relating to the contract be resolved by binding arbitration. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E. 2d 349, 352 (S.C. 2002). Respondent Daniel Lackey (Lackey) entered into a consumer finance agreement with Green Tree for the purchase of a mobile home. *Id.* at 353. His agreement also contained a provision requiring the use of binding arbitration to resolve all disputes arising out of the financing agreement. *Id.*

The Bazzle Plaintiffs

On March 25, 1997, the Bazzles filed an action against Green Tree in South Carolina state court, alleging violations of the South Carolina Consumer Protection Code. *Id.* at 352. They later amended their complaint to include class allegations, and moved the state trial court for class certification. *Id*

Green Tree filed a Motion for Stay and to Compel Arbitration pursuant to the binding arbitration provision contained in the Bazzles' consumer financing agreement. *Id.* On December 5, 1997, the trial court granted the Bazzles' motion for class certification. *Id.* At the same time, the court granted Green Tree's motion to compel arbitration, ordering the Bazzles, as well as "all members of their class who elected to be part of the action," to arbitrate their claims. *Id.* In a supplemental ruling, the trial court ordered that the class-wide arbitration "proceed on an opt-out basis." *Id.*

An arbitrator was appointed and hearings subsequently were held in the matter. *Id.* On July 24, 2000, the arbitrator ruled against Green Tree on the state law claims and awarded the class in excess of $14.5 million in damages, attorney's fees and costs. Green Tree appealed. *Id.* at 352-53.

The Lackey Plaintiffs

On May 28, 1996, Lackey, joined by George and Florine Briggs, commenced a class action against Green Tree in state

court, alleging violations of the South Carolina Consumer Protection Code. 569 S.E. 2d at 353. Green Tree moved to compel arbitration, which the trial court denied, ruling that the contract was unconscionable and therefore unenforceable. *Id.* The trial court's ruling subsequently was reversed and remanded on appeal. *Id.*

On remand, the parties agreed on an arbitrator, who *sua sponte* "raised the issue of class action arbitration and held a hearing to determine whether a class action could proceed under Green Tree's arbitration clause." *Id.* (footnote omitted) Over Green Tree's vigorous objections, the arbitrator issued an order permitting the arbitration to proceed on a class wide basis. *Id.* (footnote omitted). After a hearing on the merits, the arbitrator ruled against Green Tree and awarded $9.2 million in damages and over $3 million in attorney's fees. The trial court confirmed the award and Green Tree appealed. *Id.* at 354.

Green Tree's Appeal

On appeal, Green Tree argued in both cases that because the arbitration provision contained in its consumer financing agreement was silent on the availability of class action procedures, neither the court in *Bazzle* nor the arbitrator in *Lackey* had the authority under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, to order class-wide arbitration. *Id.* at 356-57. The South Carolina Supreme Court assumed jurisdiction and consolidated both the *Bazzle* and *Lackey* appeals. *Id.* at 351.

While conceding that "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of section 4 of the FAA," *id.* at 356, the South Carolina Supreme Court nonetheless ruled that class-wide arbitration was permissible in both the *Bazzle* and the *Lackey* actions. In so doing, it ignored federal precedent and instead adopted the California

Supreme Court's minority view "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 360. This Court now has agreed to hear the case. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 817 (2003) (*cert. granted*).

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, requires judicial enforcement of a valid agreement to arbitrate in accordance with its terms. Thus, where the parties to an arbitration agreement have not expressly provided for the right to pursue class action procedures, the FAA prohibits a court from ordering class-wide arbitration. As this Court has observed, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985).

Most federal courts to address the issue have ruled that the FAA precludes class-wide arbitration where the arbitration agreement is silent as to the availability of class action procedures. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001). Drawing support from a line of federal circuit court decisions that have refused to order consolidated arbitration where the arbitration agreement does not expressly provide for it, these courts have applied the same reasoning to preclude class-wide arbitration absent express contractual language providing for class action procedures.

In *Gilmer*, this Court observed that by agreeing to submit their disputes to arbitration, parties voluntarily exchange "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, parties to valid arbitration agreements routinely waive procedural mechanisms that otherwise would be available in litigation in favor of having their disputes heard quickly and less expensively in an arbitral forum. The class action form of litigation is simply one of many courtroom procedures that is waived as part of an arbitration agreement.

Allowing individuals subject to private arbitration agreements to pursue claims on a class wide basis would defeat most, if not all, of the practical advantages and mutual benefits of arbitration, particularly in the employment context. Not only are disputes resolved far more quickly in an arbitral forum, arbitration awards "usually [are] issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* WESTLAW FIND 8 NO. 3 SMCTEMPLL 3. As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), arbitration agreements also "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* at 123.

These benefits would be significantly diminished, if not lost altogether, if courts were permitted to order the use of complex class action procedures in arbitration in the absence of a mutual agreement thereto by the parties. Such a result would significantly discourage the use of agreements to arbitrate in the employment setting and would run counter to the strong federal public policy, endorsed time and again by this Court, favoring private arbitration.

ARGUMENT

I. A RULE THAT ALLOWS COURTS TO INCORPORATE CLASS ACTION PROCEDURES INTO AN AGREEMENT THAT IS SILENT AS TO THE AVAILABILITY OF CLASS-WIDE ARBITRATION CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION ACT

A. The FAA Requires That a Valid Arbitration Agreement Be Enforced as the Parties Wrote It

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring

arbitration.'" *Gilmer*, 500 U.S. 20, 25-26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Upon determining that the agreement to arbitrate is valid and addresses the disputed claim, the FAA requires, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

In *Gilmer*, this Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation omitted). Thus, when presented with a valid arbitration agreement, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985).

B. The Predominant View of the Federal Courts of Appeals Is That the FAA Bars Merger of Individual Claims in Arbitration Where the Parties' Agreement Is Silent on the Availability of Class Action Procedures

As the court below acknowledged, "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of section 4 of the FAA." *Bazzle*, 569 S.E. 2d at 356; *see also Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995);

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001). In *Champ v. Siegel Trading Co.*, for instance, the Seventh Circuit ruled that Section 4 of the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes." 55 F.3d at 271.

The court in *Champ* relied heavily on a line of federal circuit court decisions involving the consolidation of individual arbitrations, which, like class-wide arbitration, would permit several claims subject to individual agreements to arbitrate to be heard collectively in a single arbitration proceeding. Noting that the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all have refused to order consolidation where the arbitration agreement does not expressly provide for it, the court in *Champ* concluded that the same reasoning applies to preclude class-wide arbitration absent express contractual language providing for class action procedures. *Champ*, 55 F.3d at 274 (citations omitted).

The Seventh Circuit reasoned, as did its sister circuits, that the FAA mandates enforcement of arbitration agreements as they are written and thus prohibits a court from reading terms into the agreements that simply are nonexistent. *Id.* It thus concluded that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted).

Similarly, both the Eleventh and the Third Circuits, citing *Gilmer*, have ruled in cases involving the federal Truth in Lending Act (TILA) that the right to pursue class action procedures may be waived by signing a valid arbitration

agreement, even where the underlying statute on which the claim is based provides for class actions. *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). As the Third Circuit pointed out in *Johnson*, "whatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement,'" 225 F.3d at 375 (quoting *Moses H. Cone Mem'l Hosp.*).

While acknowledging that the FAA applies to both the *Bazzle* and *Lackey* arbitration agreements, the lower court nonetheless refused to follow the weight of federal authority barring merger of individual claims in arbitration – whether by class action procedure or by consolidation – in favor of the minority view of the California state courts that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." 569 S.E. 2d at 360-61 (citing *Keating v. Superior Court*, 183 Cal. Rptr. 360 (Cal. 1982); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998)).

Apparently concerned with the purported unequal bargaining power of parties to "adhesive arbitration clause[s]," the court below concluded that to prohibit class action procedures where the agreement is silent would allow the drafting party to "effectively prevent class actions against it without having to say it was doing so in the agreement." *Id.* at 360. The lower court's conclusion ignores, however, the now well-established principle that a party's unequal bargaining power will not, in and of itself, invalidate an agreement to arbitrate. *Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context"). Thus, the fact that a party may have drafted an agreement differently if given a chance will not

allow him to ignore the agreement to which he ultimately agreed to be bound.

II. THIS COURT'S RULING IN *GILMER* RECOGNIZES THE RIGHT OF PRIVATE PARTIES TO WAIVE JUDICIAL PROCEDURES IN FAVOR OF ARBITRATION OF INDIVIDUAL DISPUTES

In *Gilmer*, this Court observed, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted). In so doing, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). *Gilmer* thus put to rest any further contest over whether arbitration procedures are, as a general principle, adequate to resolve statutory claims. 500 U.S. at 26.

The "right" to bring a class action "is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause." *Johnson*, 225 F.3d at 369. As the Seventh Circuit noted in *Champ*:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

55 F.3d at 276 (citations omitted).

Parties to valid arbitration agreements are free to—and routinely do—contractually waive their right to access the Rule 23 class action procedure. "[S]imply because judicial remedies are a part of a law does not mean that Congress

meant to preclude parties from bargaining around their availability." *Johnson*, 225 F.3d at 377. Indeed, "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

As this Court has observed, "[j]ust as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which the arbitration will be conducted." *Volt Info. Serv., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (citation omitted). A rule that allows courts to read into a valid arbitration agreement the availability of class-wide arbitration where the parties have not expressly assented to it would ignore these well-established principles of contract law and would undermine the strong federal public policy, as articulated by this Court in *Gilmer* and its progeny, favoring arbitration.

Moreover, an individual's waiver of class action procedures will not affect the ability of other private parties not subject to arbitration agreements to pursue class-wide relief. In addition, as this Court made clear in *EEOC v. Waffle House*, 534 U.S. 279 (2002), public enforcement agencies not privy to an arbitration agreement also may continue to seek victim-specific relief in court—whether on behalf of an individual or an entire class—where specifically authorized by statute to do so. Thus, to the extent that the threat of class action litigation may serve as a deterrent against violations of the law, the prohibition of class-wide arbitration will have little, if any, effect on the availability of such procedures to those not subject to an arbitration agreement.

III. PERMITTING INDIVIDUALS SUBJECT TO PRIVATE ARBITRATION AGREEMENTS TO PURSUE CLAIMS ON A CLASS-WIDE BASIS DEFEATS MOST, IF NOT ALL, OF THE PRACTICAL ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATING EMPLOYMENT DISPUTES

A. Arbitration Enables Parties To Resolve Disputes More Quickly and More Efficiently Than Litigation

As this Court observed in *Circuit City Stores, Inc. v. Adams*,

> Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship.

532 U.S. 105, 123 (2001) (citation omitted). In addition, private arbitration gives parties the ability to resolve their disputes relatively quickly and more efficiently than in state or federal court litigation.

Indeed, the speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal courts take an average of 20.1 months to complete a civil case through jury trial, with at least three districts taking more than 30 months. Table C-5, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts (July 1, 2001 - June 30, 2002). According to a study by the Federal Judicial Center, "the median time from filing to disposition for class actions tends to be two to three times that of other civil cases." Administrative Office of the United States Courts, *The Third Branch*, Vol. 34, No. 5 (Apr. 2002). In contrast, "[a]n arbitration award usually is issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* WESTLAW FIND 8 NO. 3 SMCTEMPLL 3. In the employment context, the alacrity benefits both sides, but particularly employees, who typically can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997), at 153-54.

In addition to the relative speed with which their disputes are likely to be heard, employees are more likely to get their "day in court" in arbitration than they are in the judicial system. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted). Procedural rights, such as class action procedures, the right to a jury trial, and extensive (and often

excessive) discovery, mean little to employees who cannot find an attorney to take their case, and who, therefore, feel that the doors to justice are closed to them. Arbitration gives these employees a ready opportunity to have their claims heard. *Id.*

B. Class Action Procedures Impose a Level of Complexity and Acrimony That Is Antithetical to the Unique Nature of Employment Arbitration

Unlike the typical arbitration, employment class actions involving hundreds, if not thousands, of class members can be extremely complex and time-consuming to defend. The significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run even a small risk of catastrophic loss. "Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added), *cert. denied,* 532 U.S. 919 (2001). Similarly, the Fifth Circuit has recognized:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail."

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

Moreover, the pressure to settle exists largely independently of the merits of the underlying statutory claims.

> Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In the face of these numbers, companies often perceive that they have little choice but to cut their losses through settlement.

Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 15 The Labor Lawyer [A.B.A. Sec. Lab. & Emp. L.] 415, 416 (2000) (footnotes omitted); *see also Castano*, 84 F.3d at 746 ("[c]lass certification magnifies and strengthens the number of unmeritorious claims" and "[a]ggregation . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards") (citations omitted). This dilemma is evident in the employment context, where several employers have settled large class action discrimination suits for hundreds of millions of dollars to avoid larger litigation costs. *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. Rev. 305, 344 (2001).

These numbers give employers little choice but to cut their losses through settlement. Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), that when companies face billions of dollars in potential liability and possible bankruptcy as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d at 1298 (citation omitted).

Judge Posner further warned in *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), that improperly certifying large class actions for enormous aggregate liability would mean that "[r]ealistically, functionally, practically [the plaintiffs' lawyer in this case] is the class representative, not [the named plaintiff]." 277 F.3d at 913. The plaintiffs' lawyers, however, may have different goals from the class. *Id.* at 910'. Plaintiffs' lawyers have boasted privately about their own power that "their goal is to bankrupt the defendant or, more colorfully, to 'blow them off the New York Stock Exchange.' This approach has been recognized in class cases as the principle of 'judicial blackmail.'" Piar, 2001 B.Y.U. L. Rev. at 343 (footnote omitted).

These class action problems are even more acute in the context of private arbitration, which by its very nature is designed to promote, rather than discourage, speedy, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed. Thus, the informal nature of arbitration is, from an employee relations viewpoint, of tremendous benefit to both employers and employees.

Permitting class-wide arbitration where the parties have not explicitly agreed to pursue such procedures fundamentally undermines the benefits and advantages, and therefore would significantly discourage the use, of agreements to arbitrate in the employment setting. Many employers have adopted mandatory arbitration programs primarily to reduce litigation costs. If parties to private arbitration agreements were permitted to pursue disputes on a class basis, employers would be faced with the very burdens they sought to avoid by introducing mandatory arbitration programs.

To be sure, if employers wished to be subject to class-wide arbitration, they would express as much in the terms of their arbitration agreements. As such, courts should not be permitted to read into an arbitration agreement the availability of class-wide procedures in the absence of express language providing for them.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

ANN ELIZABETH REESMAN
RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

No. 02-634 (14)

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

FEBRUARY 2003

30 (pp)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA. 4

II. FORCED CLASS ARBITRATION CANNOT BIND ABSENT CLASS PLAINTIFFS. 9

III. FORCED CLASS ARBITRATION IS UNFAIR TO DEFENDANTS. 14

IV. THE DEFECTS OF FORCED CLASS ARBITRATION CANNOT BE REPAIRED BY INJECTING THE COURTS INTO THE ARBITRATION PROCESS. 16

V. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Al Ainsworth v. *Skurnick*, 960 F.2d 939 (11th Cir. 1992) 16
ACORN v. *Household International, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) 20
Allen v. *McCurry*, 449 U.S. 90 (1981) 15
Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 8, 9, 18
American Centennial Ins. v. *National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991) 5
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 14
Arriaga v. *Cross Country Bank*, 163 F. Supp. 2d 1189 (S.D. Cal. 2001) 7
Baesler v. *Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) 5
Baron v. *Best Buy Co.*, No. 99-14028, slip op. (11th Cir. June 1, 2001) 6
Blakeley v. *Rabon*, 221 S.E.2d 767 (S.C. 1976) 5
Blue Cross v. *Superior Court*, 78 Cal. Rptr. 2d 779 (Ct. App. 1998) 6, 17
Brown v. *KFC National Management Co.*, 921 P.2d 146 (Haw. 1996) 7
Castano v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) 17
Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) 5, 19
Charles v. *Canal Insurance Co.*, 121 S.E.2d 200 (S.C. 1961) 5
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 18
Comb v. *PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) 20
Cooper v. *Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Devlin v. *Scardelletti*, 122 S. Ct. 2005 (2002) 15
Dickler v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991) 6, 17
Doctor's Associates, Inc. v. *Casarotto*, 517 U.S. 681 (1996) 7, 8
Dominium Austin Partners v. *Emerson*, 248 F.3d 720 (8th Cir. 2001) 5
EEOC v. *Waffle House*, 534 U.S. 279 (2002) 5, 6
Federated Department Stores v. *Moitie*, 452 U.S. 394 (1981) 14
First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 4
Flexible Manufacturing System Pty. Ltd. v. *Super Products Corp.*, 86 F.3d 96 (7th Cir. 1996) 16
Gammaro v. *Thorp Consumer Disc. Co.*, 828 F. Supp. 673 (D. Minn. 1993) 5
General Telephone Co. v. *Falcon*, 457 U.S. 147 (1982) 17
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 7, 8, 18, 20
Government of United Kingdom v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) 5
Green Tree Financial Corp.-Alabama v. *Randolph*, 531 U.S. 79 (2000) 8
Hale v. *First USA Bank, N.A.*, No. 00CIV5406JGK, 2001 WL 687371 (S.D.N.Y. June 19, 2001) 7
Hansberry v. *Lee*, 311 U.S. 32 (1940) 10, 11, 13, 15
In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir 1995) 16
Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Keating v. *Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) 6, 17
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) 15
Leonard v. *Terminix International Co., L.P.*, — So. 2d —, 2002 WL 31341084 (Ala. Oct. 18, 2002) 20
Lomax v. *Woodmen of World Life Insurance Society*, 228 F. Supp. 2d 1360 (N.D. Ga. 2002) 7
Lozada v. *Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) 20
Lozano v. *AT&T Wireless*, 216 F. Supp. 2d 1071 (N.D. Cal. 2002) 7
Lloyd v. *MBNA America Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002) 6
Lytle v. *CitiFinancial Services, Inc.*, 810 A.2d 643 (Pa. Super. Ct. 2002) 20
Marsh v. *First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000) 7
Martin v. *Wilks*, 490 U.S. 755 (1989) 10
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 5
Matsushita Electric Industry Co. v. *Epstein*, 516 U.S. 367 (1996) 15
McCarthy v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994) 5
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 7
Montana v. *United States*, 440 U.S. 147 (1979) 15
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 10
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 14, 15
Pennoyer v. *Neff*, 95 U.S. 714 (1877) 10
Perry v. *Thomas*, 482 U.S. 483 (1987) 5, 7, 8
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 14, 15
Pick v. *Discover Financial Services, Inc.*, No. Civ. A. 00-935-SLR, 2001 WL 1180278 (D. Del. Sept. 28, 2001) 7
Press-Enterprise Co. v. *Superior Court*, 464 U.S. 501 (1984) 12
Rains v. *Foundation Health System Life & Health*, 23 P.3d 1249 (Colo. Ct. App. 2001) 7
Randolph v. *Green Tree Finance Corp.—Alabama*, 244 F.3d 814 (11th Cir. 2001) 7
Raytheon Co. v. *Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989) 13
Remmey v. *PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994) 18
Rodriquez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 8, 18
Sagal v. *First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001) 7
Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 8, 20
Snowden v. *Checkpoint Check Cashing, Inc.*, 290 F.3d 631 (4th Cir.), *cert denied*, 123 S. Ct. 695 (2002) 6
Sobel v. *Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972) 13
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Stein v. *Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001) 7
Szetela v. *Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002), *cert. denied*, 71 U.S.L.W. 3400 (U.S. Feb. 24, 2003) (No. 02-829) 20
Ting v. *AT&T*, — F.3d —, 2003 WL 292296 (9th Cir. Feb. 11, 2003) 6, 20
United States Parole Commission v. *Geraghty*, 445 U.S. 388 (1980) 10, 14
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 11, 13
Vigil v. *Sears National Bank*, 205 F. Supp. 2d 566 (E.D. La. 2002) 7
Volt Information Sciences, Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 5
West v. *Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424) 10
Zawikowski v. *Beneficial National Bank*, No. 98C2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) 7

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 3
9 U.S.C. § 2 ..... 4, 7
9 U.S.C. § 10 16
Fed. R. Civ. P. 23 ..... 11, 16, 17

LEGISLATIVE MATERIALS

H.R. Rep. No. 97-542 (1982) 8, 19
S. Rep. No. 68-536 (1924) 8, 19

TABLE OF AUTHORITIES—Continued

Page(s)

BOOKS, ARTICLES & TREATISES

Brafford, Anne, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331 (1996) 9
Conte, Alba & Herbert B. Newberg, *Newberg on Class Actions* (4th ed. 2002) 13, 17
Drahozal, Christopher R., *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 (2001) 8
Friendly, Henry J., *Federal Jurisdiction: A General View* (1973) 16
Gorman, Robert A., *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635 8
Hoeniger, Berthold H., *Commercial Arbitration Handbook* § 3.10 (1st ed. 1990, rev. 1-1991) 9
Maltby, Lewis L., *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 8, 9
Meyerowitz, Steven A., *The Arbitration Alternative*, 71 A.B.A.J. 78 (1985) 13
Pearson, Jessica, *An Evaluation of Alternatives to Court Adjudication in Consumer Dispute Resolution* 322 (ABA Special Comm. on Dispute Res. 1983) 9
Sternlight, Jean R., *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000) 11, 12, 13
Story, J., *Commentaries on Equity Pleading* § 97 (J. Gould 10th rev. ed. 1892) 10
Tidwell, Gary, et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* 25 (Aug. 5, 1999) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Waltcher, Daniel R., Note, *Classwide Arbitration and 10B-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380 (1989) 16

In the Supreme Court of the United States

No. 02-634

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted in support of the petitioner.[1] By letters filed with the Clerk of the Court, petitioner and respondents have consented to the filing of this brief.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in all fifty states and the District of Columbia and include banks of all types and sizes—money center banks, regional banks, and community banks. ABA members hold approximately ninety percent of the domestic assets of United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance to banks or consumers of banking services.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies that engage in lending and sales financing amounting to approximately twenty percent of all consumer credit in the United States. These companies range from independently owned consumer finance firms to the nation's largest financial-services, retail, and automobile sales finance companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters, with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity, and education finance, bank sales of investment products, small business services, and community development.

Many members of the ABA, AFSA, and CBA use standard form agreements and contracts, which include arbitration provisions. Some of those provisions authorize individual arbitration and are silent about class-action arbitration. Other arbitration provisions expressly state that class arbitrations are not permitted. Members with either sort of arbitration agreement have a strong interest in ensuring that the agreements are enforced in keeping with their terms, and that

class arbitration procedures are not imposed upon them in derogation of the Federal Arbitration Act.

SUMMARY OF ARGUMENT

Amici agree with petitioner that arbitration agreements must be enforced as written and that class arbitration procedures may not be imposed on parties who have not agreed to them. Forced class arbitration proceedings violate the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. §§ 1-16, and are inherently unfair to defendants, in part because they cannot bind absent plaintiffs.

1. The most basic principle of the FAA is that an arbitration agreement should be enforced as written. The FAA is violated when a court determines either that parties who have agreed to do so may not arbitrate, or that they shall arbitrate under a procedure to which they did not agree. The enforceability of arbitration agreements is subject to state-law contract defenses, including unconscionability, but such a defense cannot be a mere pretext for hostility to arbitration itself and cannot be a basis for imposing a fundamentally different private decision-making process.

2. Forced class arbitrations cannot be binding on absent plaintiff class members who did not agree to, and play no part in, the particular arbitration proceeding. The decision in a judicial class action is binding on absentees because courts are created by public laws to resolve disputes. The decisions of an arbitrator have authority only because of the particular parties' agreement and cannot be imposed on other persons. Moreover, a notice of a class arbitration is not a notice to which an absent class member has an obligation to respond. And because class arbitrations are often neither public nor recorded, absent class members have little ability to protect their interests. Finally, settlements of class arbitrations are not subject to review by a neutral judge, but only by the arbitrator selected by the parties, who cannot be expected to afford absentees the protection provided by a judge under Rule 23.

3. Forced class arbitrations are fundamentally unfair to defendants. Since absent plaintiff class members cannot be bound to the result of a class arbitration, the defendant can be subjected to a series of similar claims, with no prospect of a class victory but the prospect of a class defeat the first time an arbitrator rules for a plaintiff. The absence of a written record, an explanatory opinion, or judicial review makes this ratchet all the more unfair. This kind of one-sided class procedure would obviously make arbitration an unacceptable alternative for the party (such as a lender) that must run the risk of a classwide recovery without hope of obtaining a ruling that would bar future claims.

4. The defects of class arbitration cannot be repaired by injecting the courts into the arbitration process to resolve questions of class definition, form and sufficiency of notice, adequacy of representation, fairness of any settlement, and so forth. The attempt to do this would sacrifice the benefits of arbitration, leaving the worst of both worlds.

5. The decision of the court below reflects the old judicial hostility to arbitration in modern and more sophisticated dress. Its premise is that courts should not enforce agreements to arbitrate disputes on an individual basis. That premise is at odds with the FAA and this Court's decisions.

ARGUMENT

I. FORCED CLASS ARBITRATION IS CONTRARY TO THE FAA.

The source of an arbitrator's power to decide a dispute is the contract between the parties to resolve their disputes in that particular way. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties."). The FAA makes such contracts fully enforceable, 9 U.S.C. § 2, and this Court has repeatedly held that "private agreements to arbitrate are [to be] enforced according to their terms," *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989),[2] "like other contracts," *id.* at 478.[3]

Every federal court to reach the issue has held that when an arbitration agreement is silent as to class arbitration, arbitration must proceed on an individual basis and courts and arbitrators are powerless to rewrite the parties' agreement so as to compel class arbitration.[4] As this Court said in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), "[N]othing in the

---

[2] *See also Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987)

[3] It is clear that the South Carolina court did not treat the arbitration agreement at issue "like other contracts." South Carolina contract law includes the following basic principle:

> It is elementary and needs no citation of authority that the function of courts is to adjudge and enforce contracts as they are written and entered into by the parties. The court cannot make them for the parties. . . . [T]he court cannot exercise its discretion as to the wisdom of such contract or substitute its own for that which was agreed . . . .

Charles v. *Canal Ins. Co.*, 238 S.C. 600, 608-09, 121 S.E.2d 200, 205 (1961). "Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed." *Blakeley* v. *Rabon*, 221 S.E.2d 767, 769 (S.C. 1976). But that is precisely what the South Carolina court did. Pet. App. 22a.

[4] *See, e.g., Dominium Austin Partners* v. *Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *McCarthy* v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal. July 19, 1994); *Gammaro* v. *Thorp Consumer Disc. Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993), *see also, e.g., Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) ("district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); *American Centennial Ins.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings").

[FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement." *Id.* at 289 (emphasis added).

The South Carolina court, however, joined a small group of state courts that have allowed one party to pursue an arbitration procedure wholly different from the one to which the parties agreed.[5] Neither the agreement between Bazzle and Green Tree nor the agreement between Lackey and Green Tree included the absent class members or provided for class arbitration. But the court asserted that "parties with nominal individual claims" would have no effective "avenue for relief" if they could not pursue their claims on a class basis. Pet. App. 22a. It therefore imposed on the parties a decision-making procedure to which neither the parties (nor the absent class members themselves) had agreed.

The Ninth Circuit recently took a different tack: it held that arbitration agreements that explicitly preclude class arbitration are void as unconscionable under state law. *See Ting* v. *AT&T*, — F.3d —, 2003 WL 292296, at *20 (9th Cir. Feb. 11, 2003). *Ting* thus denied the parties who had agreed to arbitrate the ability to do so at all, and channelled them into court proceedings. In *Ting* and the present case, the courts failed to follow the FAA's fundamental requirement that arbitration agreements be enforced in accordance with their terms.[6]

---

[5] *See, e.g.*, *Keating* v. *Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Blue Cross* v. *Superior Court*, 78 Cal. Rptr. 2d 779 (Ct. App. 1998); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

[6] Most courts have refused to compel class arbitrations when the agreement was silent on this issue. *See* cases cited *supra* n.4. Similarly, most courts, unlike the court in *Ting*, have rejected efforts to invalidate arbitration agreements that explicitly prohibited class actions. *See, e.g.*, *Lloyd* v. *MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Snowden* v. *Checkpoint Check Cashing, Inc.*, 290 F.3d 631, 638-39 (4th Cir.), *cert denied*, 123 S. Ct. 695 (2002); *Randolph* v. *Green Tree Fin. Corp.—Alabama*, 244 F.3d 814, 815 (11th Cir. 2001); *Baron* v. *Best Buy Co.*, No. 99-14028, slip op. at 3 (11th Cir. June 1, 2001); *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied sub nom. Johnson* v. *Tele-Cash, Inc.*, 531 U.S. 1145 (2001); *Lomax* v. *Woodmen of World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (N.D. Cal. 2002); *Vigil* v. *Sears Nat'l Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002); *Pick* v. *Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001); *Hale* v. *First USA Bank, N.A.*, No. 00CIV5406JGK, 2001 WL 687371, at *7 (S.D.N.Y. June 19, 2001); *Marsh* v. *First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000); *Sagal* v. *First USA Bank, N.A.*, 69 F. Supp. 2d 627, 631-32 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Zawikowski* v. *Beneficial Nat'l Bank*, No. 98C2178, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Brown* v. *KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166 n.23 (Haw. 1996); *Rains* v. *Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1270-71 (Wash. Ct. App. 2001).

Under the FAA, arbitration agreements are subject to the same defenses that state law applies to all contracts, including unconscionability. 9 U.S.C. § 2; *see also Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *Perry*, 482 U.S. at 492 n.9. But a finding of unconscionability cannot be simply a pretext for reasserting the old judicial hostility to arbitration. It must be based on applying established state law to the facts of a particular contract, *see Perry*, 482 U.S. at 492 n.9, not a broadside ruling that an entire class of contracts, sanctioned by federal law, is inherently unconscionable.

As this Court has long recognized, parties agreeing to arbitrate their disputes are necessarily forfeiting the "procedures and opportunity for review of the courtroom," *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), in favor of the more efficient system of arbitration. Permitting parties to trade their right to go to court for the efficiency of arbitration lies at the very heart of the FAA.[7] To permit

---

[7] This Court has frequently noted that a party agreeing to arbitration is agreeing to a different forum with different procedures. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628

courts, or state legislatures, to label certain arbitration procedures unconscionable merely because they are alternatives to litigation would eviscerate the FAA.[8]

Individual arbitration of small claims is not an unconscionable process. On the contrary, as Congress recognized when it passed the FAA, arbitration is typically both faster and cheaper than litigation, *see* S. Rep. No. 68-536, at 3 (1924), and Congress has reiterated that view in more modern times.[9] *See also* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55, 56-57 (1998); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635, 646; Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 755 (2001) (noting the cost for consumers to arbitrate is decreasing "as arbitration institutions compete to provide low-cost arbitration") (footnote omitted); *cf. Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 95 & n.2 (2000) (Ginsburg, J., concurring) (discussing the low cost of arbitration). As the Court noted in *Allied-Bruce*, arbitration is particularly "helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280 (citation omitted). Thus, "for smaller, simpler, more routine cases, it is hard to beat administered arbitration." Berthold H. Hoeniger, *Commercial Arbitration Handbook* § 3.10 (1st ed. 1990, rev. 1-1991); *see also* Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331, 333 (1996) (citation omitted) ("Many consumer disputes, which often involve simple factual issues, can be resolved quickly and relatively cheaply through arbitration."). Finally, studies suggest both that arbitration is fair to consumers[10] and that those who participate in arbitration are widely satisfied that their cases were handled fairly.[11]

(1985); *see also Gilmer*, 500 U.S. at 26, 32; *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 229-30 (1989).

[8] *See Doctor's Assocs.*, 517 U.S. at 687 (holding that States are "precluded ... from singling out arbitration provisions for suspect status"); *Perry*, 482 U.S. 483 (striking California statute prohibiting arbitration of wage collection actions); *Southland Corp.* v. *Keating*, 465 U.S. 1, 13 (1984) ("[T]he purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by ... state courts or legislatures.") (alterations in original).

[9] *See* H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling ...."); *see also Allied-Bruce Terminix* v. *Dobson*, 513 U.S. 265, 280 (1995).

II. FORCED CLASS ARBITRATION CANNOT BIND ABSENT CLASS PLAINTIFFS.

By allowing each plaintiff to pursue a forced class arbitration, the South Carolina court not only rewrote the arbitration agreements that Bazzle and Lackey each had with Green Tree but also purportedly altered the rights of each absent class member. *Bazzle* upheld a process that imposed upon absent class members a proceeding they did not choose to bring, before a decision maker not selected in accordance

[10] *See* Maltby, 30 Colum. Hum. Rts. L. Rev. at 46-48 (comparing Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employment Rts. & Employment Pol'y J. 189 (1997) with data from federal district courts) (comparing the results individuals obtain in arbitration with the results they obtain in court for similar cases and finding that individuals are four times more likely to prevail in arbitration than in traditional litigation); *see also* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication in Consumer Dispute Resolution* 322 (ABA Special Comm. on Dispute Res. 1983)

[11] *See* Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business).

with their own arbitration agreements or any other rule or agreement binding on them. That process also required absent class members to opt out or to proceed with a large number of parties and claims that they did not agree could be included in the resolution of any disputes they may have.

Such a proceeding plainly cannot bind absent plaintiff class members. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *see also Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877) (mem.). Judicial class actions represent a narrow exception to this "deep-rooted historic tradition." *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (internal quotations omitted); *see Hansberry*, 311 U.S. at 41. At equity, the "necessary parties" rule required that all parties be joined to an action, no matter how "numerous they may be." *West* v. *Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (No. 17,424) (Story, J.). Because this rule made litigation simply unmanageable in some instances, equity developed an exception, the predecessor to the modern class action. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832 (1999); *West*, 29 F. Cas. at 722; *see also* J. Story, *Commentaries on Equity Pleading* § 97 (J. Gould 10th rev. ed. 1892). From these roots, the modern class action has further evolved to address certain problems.[12]

This Court has carefully guarded the rights of persons who are absent from, yet bound by, this exceptional process. Absent class members may be bound only if a court has followed procedures established by law, including a judicial de-

[12] As this Court stated in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 402-03 (1980), these problems include: "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims."

termination that they are "adequately represented" by the participants. *See Ortiz*, 527 U.S. at 846; *Martin*, 490 U.S. at 762 n.2; *see also Hansberry*, 311 U.S. at 42. This due process requirement is now embodied, in federal judicial proceedings, in Federal Rule of Civil Procedure 23. This rule was adopted pursuant to the Constitution and the laws of the United States, and determines what is necessary, and generally sufficient, to protect the rights of absent parties (and therefore to make it appropriate they be bound to the result of the class action).

A forced class arbitration lacks any such fundamental protections for absent class members. We emphasize four points: (a) lack of participation in the selection of the arbitrator; (b) the inadequacy of class notice from an arbitrator; (c) the closed proceedings; and (d) the impossibility of assuring the fair settlement of claims on a class basis. *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 112 (2000).

a. An absent class member cannot be bound by the decision of an arbitrator chosen by the named plaintiff and defendant. Absent class members may be bound by the decisions in judicial class actions because courts are established by laws binding on all relevant persons. But arbitrators derive their powers solely from the particular parties' private contract. *Cf. United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). When a person has not agreed to have his claims decided by a particular arbitrator, there is no basis by which that arbitrator can assert authority over that person. This point has been made by consumer advocates: "arbitral resolution of the claims of a plaintiff class cannot have preclusive effect on absent class members since arbitrators have no authority to bind absent parties." *See* Brief *Amicus Curiae* of Public Citizen at 23-24, *Green Tree Fin. Corp.—Alabama* v. *Randolph*, No. 99-1235 (U.S. 2000).

Here, the arbitration clause specifically reserved the selection of the arbitrator to the parties whose claims were at issue. ("All disputes, claims, or controversies . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a.) Such a provision is useful. Such a provision is useful in resolving individual disputes, but flawed when applied to a class arbitration. Absent class members cannot be bound by the ruling of an arbitrator they had "absolutely no role in selecting." Sternlight, 42 Wm. & Mary L. Rev. at 112.

This is not merely a procedural nicety. One function of a court in a judicial class action is to protect the absent plaintiff class members against the possibly contrary interests of the named plaintiffs who are supposed to be their representatives. A decisionmaker selected by the named plaintiffs and defendants is not well positioned to play that role. As Professor Sternlight notes, "the arbitrator will have been selected at least in part by the named plaintiffs or their attorneys, not by the absent class members. Thus, it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing." *Id.* at 113 (citations omitted).

b. An arbitrator selected by one of the parties is under no obligation to send any particular notice, in any particular manner, to "absent" persons. Moreover, there is no established procedure for judicial determination of the adequacy of either the contents or the method of delivery of an arbitrator's notice. And a notice of a class arbitration is not a notice to which an absent class member has an obligation to respond. In view of the fundamental importance of notice, *see Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), these multiple uncertainties about the giving of notice are a further substantial obstacle to binding absent plaintiff class members.

c. The fact that arbitrations are frequently not public and their results are often confidential creates additional problems. Unlike court proceedings, which are presumptively

open, *see, e.g., Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 507-08 (1984), arbitration is a private dispute resolution mechanism, whose proceedings are not necessarily memorialized even in a transcript, *e.g.*, Sternlight, 42 Wm. & Mary L. Rev. at 114, and whose resolution is often not supported by a written opinion.[13] This is not a problem (and may be an advantage) in resolving one-on-one disputes, but private proceedings are wholly unworkable where the rights of "absent class members" are being decided. *See Hansberry*, 311 U.S. at 41. Absent class members could have no confidence in the final decision and could not as a practical matter challenge it.

d. Settlements, also, cannot be made demonstrably fair to absent class members. One important objective of the protections afforded in judicial class actions is to prevent "the fraudulent and collusive sacrifice of the rights of absent parties." *Id.* at 45; Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 11.65 (4th ed. 2002). The trial judge plays a critical role in preventing class representatives and defendants from engineering a course of litigation or settlement that is unfair to absent class members. But because arbitrators who are selected only by the present parties lack tenure, and have no jurisdiction beyond what the parties have conferred on them, they may be far less willing or able to protect absentees against collusion by the parties who appointed them.

---

[13] *See* Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 80 (1985) (noting that in general, arbitrations are not open to the public and no record of the proceedings is kept); *see also, e.g., United Steelworkers of Am.*, 363 U.S. at 598 ("[a]rbitrators have no obligation . . . to give their reasons for an award"); *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 8-9 (1st Cir. 1989) (holding that arbitrators are not required to issue written opinions); *Sobel* v. *Hertz, Warner & Co.*, 469 F.2d 1211, 1214-15 (2d Cir. 1972) (same). By contrast, objectors in court are free to review the record to assist themselves in attacking any settlement. *See generally* 2 *Newberg on Class Actions* §§ 11.57, 11.58 (discussing the rights of objectors to class settlements).

III. FORCED CLASS ARBITRATION IS UNFAIR TO DEFENDANTS.

Because forced class arbitration decisions cannot be binding on absent plaintiff class members, class arbitration is fundamentally unfair to the defendant. A defendant may face a series of proceedings in which it has no prospect of winning more than the named plaintiff's individual dispute. But the first defeat will purport to provide relief to the entire remaining class. This problem is exacerbated by the lack of requirements for a written record, or an opinion explaining the decision, or an opportunity for substantive review.

This Court has recognized that it is "unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 547 (1974).[14] Defendants have "a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [the defendant] is bound." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985); *see also Geraghty*, 445 U.S. at 402-03 (noting that one of the benefits of class actions is "the protection of the defendant from inconsistent obligations"). Preventing defendants who prevail from being subjected to collateral attacks on decisions "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation and internal quotation marks omitted); *see also Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-33 (1979). Indeed, "central to the purpose for which civil courts have been established, [is] the conclusive resolution of disputes

[14] The 1966 amendments to the Federal Rules of Civil Procedure were specifically designed to eliminate this sort of one-sidedness, which had been a feature of the so-called "spurious" class action. *See American Pipe*, 414 U.S. at 547.

within their jurisdictions." *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (citations omitted). The important public policies underlying these rules of finality include protecting parties from "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54; *see also, e.g., Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1981); *Parklane Hosiery*, 439 U.S. at 326.

In a judicial class action "[a] judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment." *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *see also, e.g., Phillips Petroleum*, 472 U.S. at 801; *Hansberry*, 311 U.S. at 41-42. As this Court held in *Cooper*, "[u]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." 467 U.S. at 874. The requirement is made clear in Rule 23: "'[a]ll members of the class . . . are bound by the judgment entered in the action unless, in a rule 23(b)(3) action, they make a timely election for exclusion.'" *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996) (citation omitted); *see also Devlin* v. *Scardelletti*, 122 S. Ct. 2005, 2011 (2002) ("appealing the approval of a settlement is [a class member's] only means of protecting himself from being bound by a disposition of his rights he finds unacceptable").

All of these principles are violated by forced class arbitration. Because any decision rendered in a class arbitration cannot be binding on absent plaintiffs, a defendant will achieve finality through a class arbitration only if he loses and each absent class member is satisfied by the amount of damages awarded.

The importance of this point is illustrated in a related context. Under Federal Rule of Civil Procedure 23(f), a court's decision to certify a case as a class action may be immediately appealed. The rule was adopted to address the concern that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 (Advisory Committee Notes).[15] But a defendant in a forced class arbitration faces a far worse threat: it has no offsetting chance to *win* a class victory, and it typically has no avenue for immediate appeal of the class determination and has only limited judicial review after an arbitration award has been entered. *See* 9 U.S.C. § 10; *see also, e.g., Flexible Mfg. Sys. Pty. Ltd.* v. *Super Prods. Corp.*, 86 F.3d 96 (7th Cir. 1996); *Al Ainsworth* v. *Skurnick*, 960 F.2d 939 (11th Cir. 1992).[16]

IV. THE DEFECTS OF FORCED CLASS ARBITRATION CANNOT BE REPAIRED BY INJECTING THE COURTS INTO THE ARBITRATION PROCESS.

Some courts and commentators have suggested that the defects of forced class arbitration can be overcome by significant judicial participation in the arbitration process. *See, e.g.*, Daniel R. Waltcher, Note, *Classwide Arbitration and 10B-5 Claims in the Wake of Shearson/American Express, Inc.* v. *McMahon*, 74 Cornell L. Rev. 380, 404 (1989)

---

[15] *See also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (discussing the problem of "blackmail settlements" involved in large scale multistate class actions); *cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294, 1298 (7th Cir 1995) (granting the "extraordinary" relief of mandamus to review district court decision on class certification because of "pressure to settle" even in case where previous similar suits had been won by defendant).

[16] Of course, if *amici* are wrong and defendants can be forced to participate in class arbitrations, fairness would require binding absent class members.

("Classwide arbitration . . . may sacrifice due process protections if court involvement in the proceedings decreases or ceases upon certification."). But this is a suggestion to destroy the arbitration process in order to save it.

Courts that have compelled class arbitration have recognized that "[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *see also Blue Cross* v. *Superior Court*, 78 Cal. Rptr. 2d 779, 786-87 (Ct. App. 1998); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991). They have acknowledged that it will be difficult "to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay." *Keating*, 645 P.2d at 1209 (citing *Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 Va. L. Rev. 789 (1981)).

This does not adequately state the difficulty. Courts will be compelled "to make initial determinations regarding certification and notice to the class." *Keating*, 645 P.2d at 1209; *see also* Pet. App. 3a (noting that the trial court certified the class in *Bazzle*). But to do so, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 160 (1982). Courts considering certification must understand "the claims, defenses, relevant facts, and applicable substantive law." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Courts considering notice proposals would need to understand the entire dispute well enough to approve "the best notice practicable under the circumstances." *Cf.* Fed. R. Civ. P. 23(c)(2). To assure fairness, courts would also be required to "exercise a measure of external supervision" over dismissals and settlements. *Keating*, 645 P.2d at 1209. Such "careful court monitoring" would likely have to continue throughout the litigation. 1 *Newberg on Class Actions* § 1.13. And of

on Class Actions § 1.13. And of course judicial determinations would be potentially subject to review by higher courts.

All of this would require lawyers, time, and expense, defeating the very purposes arbitration was designed to serve. As the Fourth Circuit noted in another context, such judicial participation would "reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality." *Remmey* v. *PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994).

Forced class arbitration with heavy judicial participation lacks the advantages of either arbitration or judicial class actions. It eliminates the efficiencies of arbitration. And at the same time, as long as there is any substantial role for an arbitrator selected by the parties, and any remaining informality in the process, class arbitration cannot possibly provide the full protections for absent parties that are afforded by the painstakingly worked out procedures for judicial class actions.

V. FORCED CLASS ARBITRATION IS AN ATTACK ON ARBITRATION ITSELF.

The decision below reflects a modern and more sophisticated form of the old judicial hostility toward arbitration, "a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). Congress passed the FAA "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995) (citation omitted); *see also Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). In keeping with the FAA, this Court has emphatically rejected the earlier hostility. *See Rodriquez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989) (citations omitted). "[S]uspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 481 (citation omitted).

Parties enter into arbitration agreements to avoid the expense and delay of litigation. "The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase." S. Rep. No. 68-536, at 3 (1924). Over the twentieth century, arbitration evolved to provide a quick, inexpensive, and fair alternative to litigation. H.R. Rep. No. 97-542, at 13 (1982). But parties simply will not offer or agree to arbitration provisions that courts have rendered unfair and unworkable. In agreeing to arbitrate, parties weigh costs and benefits. For a court "to read such a [class proceedings] term into the parties' agreement would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotation marks, brackets, and citations omitted).

Amici's members, who use standard form lending agreements throughout the United States, face a particular difficulty. They do not know where a customer will reside in the future or where he will initiate proceedings if a dispute arises. They cannot afford to offer arbitration anywhere, if doing so may sometimes subject them to forced class arbitration.

The loss of arbitration would also harm the customers of *amici*'s members. These customers benefit not only because their own disputes are resolved more efficiently, but also because lending companies, including amici's members, can avoid much of the otherwise enormous cost of litigation.

Finally, we note that parties cannot necessarily avoid the threat of forced class arbitration by stating explicitly in their agreements that arbitration will not be done on a class basis. The court below suggested (Pet. App. 22a n.21) that it might reject such a proposition as unconscionable. Some other courts have already done so. Such courts' hostility to arbitration could hardly be more clear, resulting in either forced class arbitration or even court proceedings. *See, e.g., Ting,*

2003 WL 292296, at *20 (arbitration agreement struck because, *inter alia*, it prohibited class proceedings); *Comb* v. *PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002) (same); *ACORN* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171, 1174 (N.D. Cal. 2002) (same); *Lozada* v. *Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (same); *Leonard* v. *Terminix Int'l Co.*, — So. 2d —, 2002 WL 31341084, at *8 (Ala. Oct. 18, 2002) (striking arbitration agreement because it prohibited class proceedings); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862, 867-68 (Ct. App. 2002) (compelling arbitration, but striking prohibition on class proceedings), *cert. denied*, 71 U.S.L.W. 3400 (U.S. Feb. 24, 2003) (No. 02-829); *cf. Lytle* v. *CitiFinancial Servs., Inc.*, 810 A.2d 643, 667-68 (Pa. Super. Ct. 2002) (remanding for consideration of whether prohibition on class proceedings was unconscionable).[17]

This Court has held that arbitration agreements are enforceable so long as the parties can effectively vindicate their substantive rights. *See, e.g., Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 229-30 (1987); *see also Gilmer*, 500 U.S. at 32 (rejecting a claim that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for . . . class actions"). The combination of the cases cited above and the rulings in *Bazzle* is to supply another condition: arbitration agreements must provide for class arbitrations. This is precisely the sort of condition to the enforcement of an arbitration agreement that is forbidden under the FAA.

[17] The majority rule is that arbitration agreements that prohibit class arbitrations or class actions in favor of individual arbitration are fully enforceable under the FAA. *See, e.g.*, cases cited *supra* n.6.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

LOUIS R. COHEN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
MICHAEL D. LEFFEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amici Curiae

FEBRUARY 2003

Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

No. 02-634

IN THE

Supreme Court Of The United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKE, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*

BEST AVAILABLE COPY

33 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, preempts generally applicable state contract law and state procedural rules applied by a state court in determining whether parties can arbitrate class-wide claims under an arbitration clause, when the state court found the clause to be silent on the subject.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT

I. THE FAA DOES NOT PREEMPT THE STATE LAWS APPLIED BY THE COURT BELOW IN HOLDING THAT THE PARTIES CAN ARBITRATE CLASS CLAIMS 9

A. The Text of the FAA Permits Application of State Contract Law and Procedural Rules. . 10

B. There Is No Implied Conflict Preemption Where No Federal Law Standards Address the Subject of State Law Regulation. 12

C. The State Laws Applied by the Court Below Do Not Frustrate the Purposes of the FAA. . . . 15

II. THE COURT SHOULD NOT REACH ISSUES RAISED BY PETITIONER'S *AMICI* REGARDING STATE UNCONSCIONABILITY LAW. 18

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page**

Allied-Bruce Terminix Co.'s, Inc. v. Dobson, 513 U.S. 265 (1995) 2, 8, 16

America Online, Inc. v. Superior Ct., 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) 23

California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., 519 U.S. 316 (1997) 9

Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393 (Cal. Ct. App. 2003) 17

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 8, 16, 22

Ellis v. Taylor, 449 S.E.2d 487 (S.C. 1994) 5

Episcopal Housing Corp. v. Federal Ins. Co., 255 S.E.2d 451 (S.C. 1979) 5

Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002) 15, 23, 24

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 9

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 7, 10

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 7, 13-14

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 15

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) 24

Howlett v. Rose, 496 U.S. 356 (1990) 9

Kentucky v. Stincer, 482 U.S. 730 (1987) 19

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 5, 10-11

McGoldrick v. Companie Generale Transatlantique, 309 U.S. 430 (1940) 19

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 11

Myrtle Beach Lumber Co., Inc. v. Wiloughby, 274 S.E.2d 423 (S.C. 1981) 5

Perry v. Thomas, 482 U.S. 483 (1987) 7, 10, 16

Plaza Devel. Serv's v. Joe Harden Builder, Inc., 365 S.E.2d 231 (S.C. App. 1998) 5-6

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 9

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999) 19

Southland Corp. v. Keating, 465 U.S. 1 (1984) 7, 12, 16

Sprietsma v. Mercury Marine, 123 S. Ct. 518
(2002) 7, 14

State ex re. Dunlap v. Berger, 567 S.E.2d 265 (W.Va.),
cert. denied, 123 S. Ct. 695 (2002) ... 21-22, 23, 24

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) 20-21

Ting v. AT&T, 182 F. Supp. 2d 902
(N.D. Cal. 2002) 21, 25

TRW Inc. v. Alexander, 534 U.S. 19 (2001) 19

*Volt Info. Sciences, Inc. v. Board of Trustees
of Leland Stanford Junior Univ.*,
489 U.S. 468 (1989) ..... *passim*

Statutes

Federal Arbitration Act, 9 U.S.C. §§ 1-16. ..... *passim*

9 U.S.C. § 2 ..... 7, 10, 12

9 U.S.C. § 3 ..... 7, 11-12

9 U.S.C. § 4 ..... 6, 7, 12

S.C. Code Ann. § 37-10-102 3

Miscellaneous

Restatement (Second) of Contracts § 206 ..... 11, 14

INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") submits this brief as *amicus curiae* in support of Respondents, urging the Court to hold that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, does not preempt the state contract law and procedural rules applied by the court below in determining that the Respondent plaintiffs could arbitrate claims for class-wide relief against Petitioner Green Tree Financial Corp. ("Petitioner" or "Green Tree").

TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. In prosecuting cases throughout the federal and state courts, TLPJ seeks to advance consumers' and victims' rights, environmental protection, civil rights and civil liberties, workers' rights and workplace safety, the protection of the poor and powerless, and the preservation and improvement of the civil justice system. Based on these goals, TLPJ has become concerned over a recent trend wherein many businesses are attempting to deny consumers access to courts and to limit their own liability to consumers by imposing mandatory and binding arbitration clauses as part of routine economic transactions.

Six years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat these abuses. While TLPJ supports alternative dispute resolution that is truly voluntary between parties and affords consumers a true opportunity to enforce their legal rights, our research and investigation have

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), letters of consent to file this brief from Petitioners and Respondents have been filed with the Clerk of the Court.

convinced us that corporate abuses of the opportunity to compel arbitration sometimes serve to deny consumers any opportunity to effectively vindicate their claims. Through its Mandatory Arbitration Abuse Prevention Project, TLPJ has devoted much effort to representing consumers in fighting these abuses.

The question presented is whether the FAA preempts generally applicable state contract law and procedural rules that a state court applied in holding that a sub-prime mortgage lender's mandatory arbitration clause allows consumer plaintiffs to arbitrate claims for class-wide relief. TLPJ has a strong interest in the resolution of this question because Green Tree's preemption arguments would threaten to eliminate what this Court has held to be the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA: namely, the rules and requirements of state contract law. *See Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). The South Carolina Supreme Court found that Green Tree's arbitration clause did not clearly address the subject of class-wide claims, and proceeded to resolve this ambiguity in favor of the plaintiffs by applying the general common law rule for resolving ambiguity against the drafter. Green Tree's argument that the FAA preempts this and any other state law that furthers the goals of "efficiency and equity," Pet. Br. at 34, would give corporations license to strip consumers of important substantive and procedural rights by stealth through the imposition of mandatory arbitration clauses that do not even make mention of these rights.

Green Tree's preemption arguments also run counter to the FAA's plain language, to generally recognized federal preemption principles, and to the Court's decisions addressing the types of state laws that the FAA does preempt. TLPJ therefore respectfully submits this brief urging the Court to

affirm the decision below entering judgment on the class-wide arbitration awards issued in favor of the plaintiffs.

TLPJ has an additional interest in the resolution of this case pertaining to a question that is *not* properly before the Court, but was nevertheless raised by several *amici* filing briefs supporting Green Tree. These *amici* ask the Court to hold that the FAA preempts applications of the state common law doctrine of unconscionability that would result in findings that particular arbitration clauses are unconscionable because they explicitly purport to ban consumer claims for class-wide relief. *See, e.g.*, Brief of *Amicus Curiae* Chamber of Commerce at 5 n. 2; Brief of *Amicus Curiae* American Bankers Association, *et al.* at 6. Since the Court granted *certiorari* to resolve disputes over the manner of *enforcement* (not the alleged *illegality*) of Green Tree's arbitration clause; since neither party raises arguments involving South Carolina's law of unconscionability; and since no factual record pertaining to the elements of state law unconscionability is before the Court, TLPJ respectfully urges the Court not to reach out to address this issue.

STATEMENT OF CASE

The plaintiffs are consumers who entered into home equity and mobile home mortgage loans with Green Tree. These loans are covered by South Carolina's Consumer Protection Code, including its provision replacing the State's usury limits with the requirement that a lender ascertain a borrower's choice of legal counsel and insurance agent in matters relating to the transaction prior to the closing. *See* S.C. CODE ANN. § 37-10-102. In 1996 and 1997, plaintiffs filed the two cases that were consolidated in this appeal as putative class actions, alleging that Green Tree failed to comply with these statutory requirements in all of the transactions at issue.

Green Tree responded to both suits by moving to compel arbitration of all claims pursuant to the arbitration clauses that it put into its standard-form loan contracts. These clauses stated in relevant part that: "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a. In the case filed by plaintiffs Lynn and Burt Bazzle, the state trial court granted the plaintiffs' motion for class certification and Green Tree's motion to compel arbitration. *Id.* at 3a. In the case filed by plaintiff Daniel Lackey, the state appellate court ordered enforcement of Green Tree's arbitration clause, and the parties stipulated to arbitrate before the arbitrator who was presiding over the *Bazzle* case. *Id.* at 6a. After finding the requirements for class certification to be satisfied, the arbitrator certified a class of approximately 1,840 plaintiffs in the *Lackey* case. *Id.*

After hearing evidence showing that Green Tree had notice of the statutory requirements in many of the transactions at issue but continued to refuse to comply, the arbitrator issued awards for the plaintiffs in both cases. In the *Bazzle* case, the arbitrator awarded between $5,000 and $7,500 in damages to each of the 1,899 plaintiffs for a total award of $10,395,000. *Id.* at 4a. In the *Lackey* case, the arbitrator awarded $5,000 in damages to each plaintiff for a total award of $9,200,000. *Id.* at 7a. State trial courts entered judgment on the plaintiffs' motions to confirm both class-wide arbitration awards. The South Carolina Supreme Court assumed jurisdiction and consolidated Green Tree's appeals from these orders on the question of whether the trial court in *Bazzle* and the arbitrator in *Lackey* exceeded their legal or contractual authority by allowing the plaintiffs to arbitrate class-wide claims. *Id.* at 8a.

The South Carolina Supreme Court applied established state contract law principles in affirming the decisions below permitting arbitration of class claims. First, the court found that, "if the terms of a contract are clear and unambiguous, the Court must enforce the contract according to its terms regardless of its wisdom or folly." *Id.* at 17a (citing *Ellis v. Taylor*, 449 S.E.2d 487 (S.C. 1994)). Next, the court cited the maxim that "[a]mbiguous language in a contract . . . should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id.* (citing *Myrtle Beach Lumber Co., Inc. v. Wiloughby*, 274 S.E.2d 423 (S.C. 1981) (case involving non-arbitration contract)). The court also cited this Court's precedent applying the same state law rule to arbitration clauses covered by the FAA. *Id.* at 18a (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

The state court below then made a factual finding that Green Tree's arbitration clause was "*silent* regarding class-wide arbitration" because the clause nowhere mentions the issue. *Id.* at 19a (emphasis in original). The court considered Green Tree's arguments against class-wide arbitration based on the clause's language pertaining to "disputes . . . arising from or relating to *this contract*" and "relationships which result from *this contract*," *id.* (emphasis in original), but concluded that "[a]t best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree." *Id.*

The South Carolina Supreme Court thus held that the plaintiffs could arbitrate their class claims based on the "general principles of contract interpretation" that apply to Green Tree's arbitration clause, *id.* at 20a-21a, and based on established state law allowing consolidation of claims subject to arbitration. *Id.* at 18a-19a (citing *Episcopal Housing Corp. v. Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979); *Plaza Devel. Serv's v. Joe Harden*

Builder, Inc., 365 S.E.2d 231 (S.C. App. 1988)). The court noted a split of authority among federal and state courts on whether class-wide arbitration was allowed under the FAA absent express contractual authorization, but noted that federal court decisions barring such proceedings were based largely on Section Four of the Act, 9 U.S.C. § 4, which by its terms does not apply to state courts. *Id.* at 20a. Finally, the court found that it would be fundamentally unfair to strip consumers of the right to seek class-wide relief through non-negotiable, adhesive contracts that nowhere even make mention of this right:

> If we enforced a mandatory adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.

Id. at 22a.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court correctly applied ordinary state contract law and state procedural rules in holding that Green Tree's arbitration clause allows arbitration of the plaintiffs' claims for class-wide relief. Green Tree argues that the FAA preempts these state laws because the Act prohibits

any result that is not explicitly spelled out in the arbitration clause itself. These arguments fail on several counts.

First, Green Tree's preemption arguments are contrary to the text of the FAA , which expressly preserves state contract law and allows state courts to apply their own procedural rules when they are asked to enforce arbitration clauses. The FAA's savings clause makes arbitration clauses revocable on the same legal and equitable grounds as apply to any other contract. *See* 9 U.S.C. § 2. Based on this savings clause, this Court has held repeatedly that the Act preserves generally applicable state contract law. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Similarly, the FAA's procedural rules for enforcing arbitration clauses apply only in "the courts of the United States" or "any United States District Court." 9 U.S.C. §§ 3 and 4. Based on this statutory language, the Court has rejected any attempt to make these rules apply in state court cases. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984).

Second, Green Tree's call for a radical expansion of FAA preemption here does not comport with general principles of implied conflict preemption. When addressing alleged conflicts under other federal statutes, this Court has held that there can be no implied conflict preemption based on frustration of federal purposes where no federal law addresses the subject that state law is regulating. *See, e.g., Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527-28 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995). The FAA contains no provisions setting out federal contract interpretation rules or addressing multiple-party disputes. *Volt Info. Sciences*, 489 U.S. at 474 and 476 n.5 (1989) (noting absence of federal law

for interpreting contracts and FAA's silence on multiple-party issues). Since neither the FAA nor any other federal law speaks to the parties' disputes over contract interpretation and the permissibility of aggregating claims, the court below properly applied state law to these issues.

Finally, the state laws at issue here do not conflict with the FAA or the Act's underlying purposes. The Court has only found the FAA to preempt state laws that show hostility towards arbitration by specifically interfering with the parties' *contractual selection of forum*, either by imposing unique burdens that limit the enforcement of arbitration clauses or by barring all arbitration of claims. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265 (1995). The state laws applied by the court below did not target or even address questions of forum selection, since all parties agreed that their claims were subject to arbitration. Instead, the court properly applied state law to resolve the separate issue of whether the plaintiffs could obtain class-wide relief, an issue that does not touch upon the FAA's preemptive policy goals for protecting contractual forum selection.

On a completely separate matter, the Court should not use this case to decide issues raised by Green Tree's *amici* regarding the state common law doctrine of unconscionability that are not raised in the question on which *certiorari* was granted. As the Court has recognized, unconscionability is a state law ground for *revoking* contracts, including arbitration agreements. *See Casarotto*, 517 U.S. at 687. Since all of the parties here agree that the arbitration clause is *enforceable*, albeit based on conflicting understandings of its terms, the separate issues of whether this or a differently-worded arbitration clause would be unconscionable (and therefore

unenforceable) under generally applicable state contract law, or whether the FAA would preempt such state law, were not briefed by the parties, and therefore are not properly before the Court. *See* S. Ct. Rule 14.1(a). The Court should decline the invitation by several of Petitioner's *amici* to reach out and address these separate issues.

ARGUMENT

I. THE FAA DOES NOT PREEMPT THE STATE LAWS APPLIED BY THE COURT BELOW IN HOLDING THAT THE PARTIES CAN ARBITRATE CLASS CLAIMS.

Because preemption constitutes a radical intrusion on a state's power, this Court has long recognized a strong presumption against preemption of state laws. Particularly where "'federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The state laws applied by the court below were a common law rule of contract interpretation and a procedural rule for administering cases filed in state court, both areas of traditional and almost exclusive state regulation. *See, e.g., Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state. . ."); *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The States thus have great latitude to establish the structure and jurisdiction of their own courts."). Therefore, Green Tree bears the considerable burden of

demonstrating that it was the clear and manifest purpose of Congress in enacting the FAA to displace these state laws. In light of the FAA's plain language and this Court's decisions regarding implied conflict preemption generally and preemption under the FAA specifically, Green Tree cannot bear this burden.

A. The Text of the FAA Permits Application of State Contract Law and Procedural Rules.

The lower court's application of state contract law principles and state procedural rules is consistent with, and indeed is invited by, the express provisions of the FAA. The Act proclaims that written arbitration agreements "shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has construed this savings clause to preserve the application of generally applicable state contract law, whether of legislative or judicial origin, to arbitration clauses. *Perry*, 482 U.S. at 492 n.9. This includes state laws governing contract formation and interpretation, as well as revocation. *See, e.g., First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter. . .courts generally apply ordinary state-law principles that govern the formation of contracts."); *Volt Info. Sciences*, 489 U.S. at 474 ("the interpretation of private contracts is ordinarily a question of state law").

By applying the established rule of South Carolina contract law that ambiguity shall be construed most strongly against the drafter to the question of whether plaintiffs could arbitrate class claims, the court below followed the directives of the FAA and of this Court. In *Mastrobuono*, this Court was asked to decide whether two investors could recover punitive damages in arbitration where their broker's standard-form

contract did not explicitly address the subject, but contained a choice-of-law clause that arguably prohibited the claims and an arbitration clause covered by the FAA that arguably allowed them. *Mastrobuono*, 514 U.S. at 58-61. After finding that, "[a]t most, the choice-of-law clause introduces an ambiguity" into the agreement, the Court allowed arbitration of the claims because "respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62 (citing Restatement (Second) of Contracts § 206, and relevant state and federal court opinions). Thus, the South Carolina Supreme Court's reliance on state contract law to resolve the ambiguity it found in Green Tree's arbitration clause over arbitration of class claims is perfectly consistent with this Court's teachings regarding the FAA's savings clause.[2]

Similarly, it was appropriate for the state court below to rely on state procedural rules in deciding whether the parties could arbitrate class claims in light of the limited scope of the FAA's own procedural rules. Although the FAA establishes procedures for judicial enforcement of arbitration clauses, these rules only apply to cases filed in the "courts of the United

---

[2] While *Mastrobuono* applied the New York and Illinois common law rule for construing contractual ambiguity against the drafter, the Court also observed the court-made rule under the FAA that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . ." *Id.* at 62 n.8 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)). In *Mastrobuono*, the *Moses H. Cone* rule and the state common law rule both yielded the same result favoring arbitration of the plaintiffs' punitive damages claims. If the *Moses H. Cone* rule were found to apply here, it should likewise yield the same result brought about by the state common law rule, namely that ambiguities in Green Tree's arbitration clause be resolved in favor of arbitrating the plaintiffs' class claims.

States," 9 U.S.C. § 3, or in "any United States district court" having jurisdiction based on the parties' underlying claims, 9 U.S.C. § 4. Thus, even when finding that state laws were preempted by Section Two of the Act, this Court has gone out of its way to emphasize that "we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Southland*, 465 U.S. at 16 n.10; *see also Volt Info. Sciences*, 489 U.S. at 477 n.6 ("we have never held that §§ 3 and 4, *which by their terms appear to apply only to proceedings in federal court*, . . . are nonetheless applicable in state court.") (emphasis added). Since the FAA's procedural rules do not bind state courts, the Act should not be held to preempt South Carolina decisional law allowing consolidation of arbitrable claims.

In short, contrary to Green Tree's contentions here, the FAA was written to *accommodate*, not to preclude, a state court's application of ordinary state contract law principles and state procedural rules in construing and enforcing an arbitration clause. The court below was therefore correct to apply these types of state laws in holding that Green Tree's arbitration clause allows arbitration of class claims.

B. There Is No Implied Conflict Preemption Where No Federal Law Standards Address the Subject of State Law Regulation.

As the Court has recognized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Therefore, the FAA can only displace state law through the doctrine of implied conflict preemption. *Id.* at 477-78. In order to establish that the FAA impliedly preempts the state contract interpretation and procedural rules applied by the court below, Green Tree must

demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp.*, 514 U.S. at 287 (citations omitted). Implied conflict preemption cannot lie here because the FAA contains no independent rules of federal law for interpreting contracts or for addressing issues relating to multiple-party disputes.

This Court has recognized that the FAA does not set out independent federal standards for interpreting contracts or for addressing multiple party disputes. In the case of the former, the Court explained that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Sciences*, 489 U.S. at 474. In the case of the latter, the Court observed that "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate." *Id.* at 476 n.5. Based on this recognition, the Court found that state laws authorizing courts to consolidate arbitration proceedings would "foster the federal policy favoring arbitration" under the FAA. *Id.* The Court has endorsed the application of state contract law and procedural rules like those applied by the court below on the ground that these state laws help to resolve issues that the express provisions of the FAA do not address.

When addressing preemption arguments under other federal statutory schemes, the Court similarly has held that there cannot be implied conflict preemption where there is no federal law standard addressing the subject of state law regulation. In *Freightliner Corp.*, for example, the Court held that a state tort law standard of care calling for antilock brakes in 18-wheel

tractor-trailers was not preempted by federal law because the only federal regulation that ever addressed the subject of antilock brakes on these vehicles had been repealed. *Freightliner Corp.*, 514 U.S. at 284-85. The Court held that "it is not impossible . . . to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Likewise, the Court held that there could be no frustration of federal purposes because "[a] finding of liability against petitioners would undermine no objectives or purposes with respect to ABS devices, since none exist." *Id.* at 289-90; *see also Sprietsma*, 123 S. Ct. at 527-28 (finding no implied conflict preemption of common law tort claims in the absence of governing federal regulation).

The same rule should apply here against Green Tree's arguments for a radical expansion of FAA preemption to displace state laws governing contract interpretation and multi-party disputes, issues that Congress itself has never addressed. While Congress has not spoken to these matters, state lawmaking authorities have given these issues their considered judgment. The court below applied South Carolina's rule for construing contractual ambiguity against its drafter, a default rule that also furthers basic fairness concerns by ensuring that the party who has the "greater opportunity to prevent mistakes in meaning . . . is responsible for any ambiguity and should be the one to suffer from its shortcomings." Pet. App. at 17a; *see also* Restatement (Second) of Contracts § 206, Comment (a) (1979) (principle of "*contra preferentem*" guards against situation where party guarding its own interests will "leave meaning deliberately obscure, intending to decide at a later date what meaning to assert."). The court below also applied state decisional law allowing aggregation of claims subject to arbitration, recognizing that, in cases like this one involving "identical issues against one defendant," the rule serves the

"interest of judicial economy." Pet. App. at 22a. These important state policy goals should not be subverted in the complete absence of evidence that Congress ever gave any consideration to these issues. Since the FAA is silent on the subjects to which the court below applied state law, there is no basis for a finding that these state laws are preempted based on any alleged conflict with federal law.[3]

C. The State Laws Applied by the Court Below Do Not Frustrate the Purposes of the FAA.

Even without the FAA's savings clause preserving state contract law, there would be no basis for finding that the Act preempts the state laws that the court below applied in construing *and enforcing* Green Tree's arbitration clause. Since neither express nor field preemption is at issue, the FAA only preempts those state laws whose application would conflict with the Act's underlying purposes and objectives. *Volt Info. Sciences*, 489 U.S. at 477-78. The Court has often stated that Congress enacted Section Two of the FAA with the primary goals of "revers[ing] the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts" and of "plac[ing] arbitration agreements upon the same footing as other contracts." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991)).

---

[3] Since neither the FAA nor any applicable federal regulations address these issues, Green Tree's preemption arguments would require this Court to devise federal common law rules of contract interpretation from the ground up and would make every dispute over any term in an arbitration clause a federal question giving rise to the Court's jurisdiction.

Based on these goals, the Court has found that the FAA preempts two types of state laws that show hostility towards arbitration by aiming to restrict enforcement of the parties' contractual selection of the private forum. The first are state laws that single out arbitration clauses for disfavored treatment by imposing unique obstacles to their enforcement, thereby placing them on a "different footing" from other contracts. *See Casarotto*, 517 U.S. at 687 (FAA preempts state statute that "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally"); *Allied-Bruce Terminix*, 513 U.S. at 269-70 (FAA preempts state statute that makes all pre-dispute arbitration agreements invalid and unenforceable). The second are state laws that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue," *Perry*, 482 U.S. at 492 n.9, such as statutory anti-waiver rules that are construed to bar enforcement of *all* arbitration clauses in cases involving specific types of claims. *Southland*, 465 U.S. at 10.[4]

In light of these decisions, the FAA should not be found to preempt the state laws applied by the court below for the simple reason that *they did not address disputes over forum selection*. All parties have agreed that the plaintiffs' claims are subject to arbitration under Green Tree's arbitration clause. Given this agreement regarding forum, the parties' *separate* dispute over whether the clause allows individual and/or class

---

[4] To the extent that the *Southland* preemption scenario is relevant here, it is worth emphasizing that the only party seeking to bar arbitration of an entire category of claims, namely all claims for class-wide relief, is Green Tree itself. Given the parallels between Green Tree's arguments and the statute that was preempted in *Southland*, Green Tree is in a curious position to be putting all of its eggs in the FAA preemption basket.

claims does not implicate the FAA's policy goals, and therefore was properly decided through the application of state law.

Although it should be clear that the parties' disputes are over matters decided by state law, it should also be clear that Green Tree is the only party whose arguments in this case show an overt "hostility towards arbitration" that could even arguably be found to threaten the FAA's underlying goals. In support of its position that the FAA enacts a presumptive ban on arbitration of class claims, Green Tree argues that "forced class arbitration creates a *bizarre and dangerous* hybrid that imposes the *expense and delay* of court litigation without the necessary due-process safeguards of court involvement and review," that "class arbitrations *lack the essential protections* mandated in the courts," and that class arbitration "raises difficult legal and practical questions. . ." Brief at 41, 42 (emphases added); *see also* Brief of Appellant Conseco Finance Serv. Corp., f/k/a Green Tree Finance Serv Corp. in *Eastman v. Conseco Finance Serv. Corp.*, Wis. Sup. Ct. No. 01-1743, *bankruptcy stay entered* (2003) at 8 ("Imposition of class arbitration would likely cause a party to abandon arbitration altogether . . .") A court that recently agreed with Green Tree's position voiced a similarly generalized hostility towards arbitration by basing its holding on a completely hypothesized "multi-million dollar class arbitration award entered on *nothing more than a whim* [that] cannot be corrected. . ." See *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 410 (Cal. Ct. App. 2003) (emphasis added).

Regardless of the merit of Green Tree's attitude towards arbitration, the parties' dispute here does not implicate the FAA's goals for protecting contractual forum selection. All parties agree that their claims are subject to arbitration under Green Tree's arbitration clause. The FAA does not answer or

even address the parties' separate disagreement over how to resolve ambiguity in the terms of that clause regarding the aggregation of arbitrable claims. The FAA therefore does not preempt the state contract law and procedural rules applied by the court below to resolve this disagreement in favor of allowing the parties to arbitrate class claims.

II. THE COURT SHOULD NOT REACH ISSUES RAISED BY PETITIONER'S *AMICI* REGARDING STATE UNCONSCIONABILITY LAW.

Green Tree argues that this is a case where the Court must interpret contract terms. Br. at 18-45. Several *amici* supporting Green Tree ask the Court to go beyond questions of contract interpretation, however, and to opine upon the FAA's impact on state law relating to a contract *defense* not raised by either party. These *amici* ask the Court to declare that the FAA preempts application of state laws regarding unconscionability to contractual bans on class actions that are included in some arbitration clauses.[5] The Court should refuse to decide this question, which is not presented here and was not addressed by the state court below, on the basis of the highly selective and often erroneous arguments offered by Green Tree's *amici*.

First, the issue of unconscionability law is not presented in the Petition, which poses the question of whether the FAA

[5] *See, e.g.*, Brief of the Chamber of Commerce at 5, n. 2 (this case is an opportunity to "dispatch [the] shibboleth" that contract bans on class actions are unconscionable); Brief of Directv, Inc. at 4-5 (attacking unconscionability cases); Brief for American Bankers Association, *et al.*, at 6 (case holding that a contractual ban on class actions was unconscionable failed to recognize that the FAA requires enforcement of all arbitration clauses according to their terms).

"prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration." Pet. at i. This is a question of contract enforcement and interpretation as to what meaning should be given to a contract's terms. The *amici's* question regarding the intersection of the FAA and state laws of unconscionability, however, does not focus on the contract's language or how it should be enforced. The unconscionability question involves application of an entirely different set of state laws relating to defenses seeking the *revocation* of a contract.

The Court should refuse to address this new question. This Court does not, in all but the most "exceptional cases," address questions raised after *certiorari* is granted. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *McGoldrick v. Companie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Here, there is nothing "exceptional" about the issues raised by *amici*. *Cf. TRW Inc. v. Alexander*, 534 U.S. 19, 34 (2001) (refusing to decide new issue first raised by respondent in its brief on the merits); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999) ("We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.").

Amici argue that the issues of contract interpretation and contract defenses are inextricably linked, suggesting that their proposition that the FAA creates a presumptive prohibition against class arbitration when a contract is silent on the subject necessarily implies that arbitration clauses are exempt from generally applicable contract defenses. This is a non sequitur

– these are separate sets of laws that serve different purposes. Whether or not the FAA requires particular contract language to allow arbitration of class claims does not answer the question of whether generally applicable state contract law can be used to strike down clauses that expressly ban these procedures.

Another reason for the Court not to address the issue raised by Green Tree's *amici* is that the issue was not raised before or actually decided by the South Carolina Supreme Court.[6] The failure of the state court to decide this issue is crucial here because it is unclear on this record how that issue might have been decided, and therefore it is unclear exactly what type of state law *amici* are trying to preempt. First, there is no indication as to the South Carolina law requirements for a finding of procedural unconscionability in contract formation. While the court below noted that the arbitration clause was promulgated as a contract of adhesion, that does not always equate to a finding of procedural unconscionability. In many states, procedural unconscionability requires a showing of some additional element, such as "surprise." There are no facts in the record on whether the contract at issue was promulgated in such a manner as to constitute a "surprise" for the consumer plaintiffs, as that concept might be interpreted by the South Carolina Supreme Court.[7]

---

[6] The only time that the state court below mentioned issues regarding the legality and equity of explicit class action bans in adhesion contracts, the court concluded that "this present case dose not raise this question . . . ." Pet App. at 22a n.21.

[7] Several of Green Tree's *amici* excoriate the case of *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), and ask this Court to say something that would reverse the decision in *Ting* and various other cases like it. Among the many facts developed in that case not mentioned by these *amici* is an enormous body of evidence establishing that AT&T communicated to its customers about its arbitration clause in a manner that company officials knew would ensure that very few customers would learn of the clause. After a full trial on the merits, the district court there held that the terms of the arbitration clause (including its ban on class actions) would be a surprise to the class there, citing to a wealth of documents and testimony. *Ting v. AT&T*, 182 F. Supp. 2d 902, 911-13, 929-30 (N.D. Cal. 2002). Conseco's *amici* would like this Court to pass on the unconscionability of contractual bans on class actions without actually hearing a case containing such a factual record on questions like surprise.

The law of South Carolina is also unclear on some of the central legal questions underlying any claim that a contractual ban on class actions is substantively unconscionable. In the states that have held these bans to be unconscionable in some circumstances, those holdings have often been based on general state laws relating to exculpatory clauses. Typical of these cases is *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va.), *cert. denied*, 123 S. Ct. 695 (2002), where the court reviewed a number of longstanding state cases relating to exculpatory clauses (none of which involved arbitration clauses) and concluded that:

> Based on all of the foregoing and in fidelity to the approach that we have long taken in this area, we recognize and hold that exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Id. at 275-76. After reviewing the facts before it, the *Dunlap* court found that a contract provision barring class actions would effectively act as an exculpatory clause in that case, and thus held it to be unconscionable. Here, however, there is no statement of South Carolina law on exculpatory clauses, much less on how such law would apply to this setting.

The Court should also refuse to decide or comment on the issue of whether contractual bans on class actions included in arbitration clauses may ever be found unconscionable because the issue has not been fully or fairly briefed. The importance of such briefing is clear from the fact that *amici* make a number of dubious or incorrect statements of law in support of their effort to have the Court decide this issue. The New England Legal Foundation asserts, for example, that any state law striking down a contractual ban on class actions would violate the FAA because it fails to recognize the "sanctity of contract." Brief at 15, n.18. The American Bankers Association, similarly, insists that cases holding that contractual bans on arbitration are unconscionable ignores a requirement in the FAA that all contracts be enforced "according to their terms." Brief at 6. These arguments ignore the fact, discussed above, that the FAA contains a savings clause providing that particular arbitration clauses will not be enforced if there are grounds under state contract law for their invalidation. The Court has thus recognized that the defense of unconscionability is available to parties challenging arbitration agreements. *Casarotto*, 517 U.S. at 687. Accordingly, to the extent that state contract law recognizes a defense of unconscionability, there is an important and well-recognized exception to the *amici's* blanket assertion that any conceivable contract term imposed by a drafter is sacred and must always be enforced.

Similarly, Green Tree's *amici* incorrectly assert that state laws applying the doctrine of unconscionability to bans on class actions in arbitration are necessarily rooted in a hostility to arbitration. *See, e.g.*, American Bankers Association Brief at 7. This argument overlooks the fact that many states sharply limit the use of exculpatory clauses in *all* contracts, whether or not they contain arbitration clauses. *See, e.g., Dunlap*, 567 S.E.2d at 275-76. For example, before any of the California cases cited by *amici* were decided, the rule that contractual class action bans can be unconscionable based on their exculpatory effects was applied in a case that had nothing to do with arbitration. *See American Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (striking down retailer's out-of-state forum selection clause based in part on prohibition of consumer class actions).

Although *amici* claim that various cases not before the Court improperly single out arbitration clauses for suspect treatment, these *amici* advocate an approach that *itself* singles out arbitration clauses for different treatment from that given to any other contract. The *amici's* analysis is as follows: even if a state's general law of unconscionability would strike down class action bans as illegal exculpatory clauses in contracts that do *not* require arbitration, that state law is overridden by the FAA any time these provisions are included in a section of a contract that *does* require arbitration. This notion contradicts the Court's instruction that the FAA's main purpose is to "'place arbitration agreements *upon the same footing as other contracts*.'" *Waffle House*, 534 U.S. at 289 (emphasis added) (citation omitted). Nothing in the Act permits parties to launder otherwise illegal contract terms and make them legal merely by inserting them under the heading "arbitration." As one state court recognized, the FAA does not allow for this kind of escape from liability "merely because the prohibiting or limiting

provisions are part of or tied to provisions in the contract relating to arbitration." *Dunlap*, 567 S.E.2d at 280.[8]

Similarly, *amici* suggest that the Court can hold that class action bans are never unconscionable because the class action is merely a procedural device, and arbitration clauses may enact any procedures imaginable without being unconscionable.[9] This theory is plainly incorrect, however, under this Court's own teachings. Rules regarding filing fees and other forum costs of arbitration are clearly procedural, not substantive, in nature. Under these *amici's* theory, therefore, an arbitration clause could impose enormous fees against a consumer and be immune from any state laws relating to unconscionability. This Court has recognized, however, that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating [its] rights." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 81 (2000). Notwithstanding the false dichotomy suggested by Green Tree's *amici*, if a procedural device (such as a contractual class action ban) would in some cases "effectively" bar individuals from vindicating their substantive rights, and thus would have the same impact as a more direct exculpatory clause, the procedural quality of this contract provision does not save it from violating state laws relating to unconscionable contracts. If every contract term labeled "procedural" were beyond the reach of state law, the drafters of adhesive contracts could easily evade

---

[8] These decisions involving state law anti-exculpatory principles also comply with this Court's instruction that arbitration clauses are only enforceable under the FAA if they allow parties to effectively enforce their statutory rights. *See, e.g., Waffle House*, 534 U.S. at 295 n.10.

[9] *See, e.g.*, Brief of New England Foundation at 21 n. 25; Brief of Equal Employment Advisory Council at 12.

limits on exculpatory clauses by requiring persons with small claims to travel to a completely inaccessible forum (perhaps the outback of New Zealand) to arbitrate claims.

As further proof of the dangers of resolving *amici's* new issue, the American Bankers Association suggests that contractual class action bans would never bar persons from vindicating their rights, citing several law review articles, as well as snippets of legislative history and a few cases that do not even involve class actions. Brief at 8. The practical effect of a class action ban is a factual issue, one that the Court should not address in the vacuum presented by the *amici*. In a case where there *was* a significant record developed at trial, that record demonstrated that a number of successful cases brought on a class action basis against a corporate defendant could never have been brought on an individual basis, whether in court or in arbitration. *Ting*, 182 F. Supp. 2d at 918. At the conclusion of that trial, the federal district court held that "the prohibition on class actions will prevent class members from effectively vindicating their rights in certain categories of claims . . . ." *Id.* at 931. This Court should therefore reject the suggestion, based largely on a few law review articles, that this case presents a vehicle for resolving fact-intensive questions that neither the court below nor the parties have addressed.

The state court below was correct to apply state law in holding that the ambiguous terms of Green Tree's arbitration clause allowed the plaintiffs to arbitrate their class claims. In light of the state court's decision enforcing the arbitration clause, this Court should not address questions about whether or not *different* arbitration clause terms would be unenforceable as a matter of state or federal law.

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW,
Suite 800
Washington, D.C. 20036
(202) 797-8600

Counsel for *Amicus Curiae*

Date: March 26, 2003

Supreme Court
FILED
26
Mar 26 2003

No. 02-634

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a/ GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE /FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In a Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari To The Supreme Court of South Carolina

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

STACY J. CANAN*
DEBORAH M. ZUCKERMAN
NINA SIMON
JEAN CONSTANTINE-DAVIS
AARP FOUNDATION

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

*Counsel of Record

MICHAEL R. SCHUSTER
AARP

Counsel for *Amicus Curiae*
AARP

BEST AVAILABLE COPY

36 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. CONSUMERS NEED PROTECTION DUE TO THE EXPLOSIVE GROWTH OF SUBPRIME LENDING AND THE PREDATORY LENDING PRACTICES EMPLOYED BY SOME SUBPRIME LENDERS 5

A. Studies Show That Most Subprime Lenders Target Older and Minority Homeowners 9

1. Older Homeowners Receive a Disproportionate Share of Subprime Loans 9

2. Racial Minorities And Women Receive a Disproportionate Share of Subprime Loans 10

B. The Aftermath of Predatory Lending Harms Homeowners and Destroys Neighborhoods 11

1. Predatory Lending Has Led to Increased Residential Foreclosure Rates 11

2. Predatory Lending Is Destroying Neighborhoods 13

II. FEDERAL LAWS AND REGULATORS ARE NOT ADEQUATELY PROTECTING CONSUMERS FROM THE HARMFUL EFFECTS OF PREDATORY LENDING AND PREVENTING THE BURGEONING GROWTH OF PREDATORY LENDING 14

III. STATE LAWS SUCH AS S.C. CODE ANN. § 37-1-102 (2002) ENACTED TO PROTECT THE PUBLIC INTEREST PURSUANT TO STATE POLICE POWERS SHOULD BE AFFORDED GREAT DEFERENCE 16

A. Courts Broadly Construe State Consumer Protection Laws in Order to Effectuate Their Remedial Purpose to Adequately Protect Consumers from Unfair and Deceptive Busines; Practices 16

B. Many States Have Necessarily Enacted Laws Under Their Police Powers in Order to Deter Abusive Lending Practices, Protect Vulnerable Consumers from Unscrupulous Mortgage Lenders and Provide Redress for Victims in Response to the Devastating Effects of Predatory Lending 18

C. Private Attorney General Enforcement Is Pivotal To The Enforcement of State Consumer Protection Laws 21

1. Class Actions Are an Essential Vehicle for Facilitating Private Attorney General Actions 22

2. Arbitration Provisions Inserted Into Consumer Adhesion Contracts That Preclude Class Actions Undermine Private Attorney General Enforcement of Important State Consumer Protection Laws Thereby Thwarting Their Remedial Purpose 22

a. Concurrent with the Growth of Predatory Lending is the Pervasive Use of Mandatory Binding Arbitration Clauses in Consumer Adhesion Finance Contracts 23

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 22

Aquino v. Public Finance Consumer Discount Co.,
606 F.Supp. 504 (E.D. Pa . 1985) 21

California v. ARC America Corp.,
490 U.S. 93 (1989) 19

Culpepper v. Inland Mortgage Corp.,
132 F.3d 692 (11th Cir. 1998) 8

Culpepper v. Irwin Mortgage Corp.,
253 F.3d 1324 (11th Cir. 2001) 8

Edwards v. Your Credit, Inc.,
148 F.3d 427 (5th Cir. 1998) 21

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 22

Farrar v. Hobby,
506 U.S. 103 (1992) 21

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 18

French v. Wilson, 446 F.Supp.
216 (D.R.I. 1978) 21

Green Tree Finance Corp. v. Holt,
171 U.S.Dist. LEXIS 11765 (N.D. Ala. 1997) 23

Harris v. Green Tree Finance Corp.,
183 F.3d 173 (3d Cir. 1999) 23

Iadanza v. Mather,
820 F.Supp. 1371 (D. Utah 1993) 17

Jackson v. Check' N Go, Inc.,
No. 99-C-7319, 2000 U.S.Dist. LEXIS 8352
(N.D. Ill. June 13, 2000) 22

In re Knepp,
229 B.R. 821 (Bankr. N.D. Ala. 1999) 24

McGowan v. King, Inc.,
569 F.2d 845 (5th Cir. 1978) 21

Pridgen v. Green Tree Fin. Serv. Corp.,
88 F. Supp. 2d 655 (S.D. Miss. 2000) 23

Smith v. Commercial Banking Corp.,
866 F.2d 576 (3rd Cir. 1989) 17

STATE CASES

Baierl v. McTaggart,
245 Wis. 2d 632, 629 N.W.2d 277 (2001) 21

Bazzle v. Green Tree Financial Corp.,
569 S.E.2d 349, 351 S.C. 244 (2002) 5

Davis v. NationsCredit Finance Srvc. Corp.,
326 S.C. 83, 484 S.E.2d 471 (S.C 1997) 17

Dressel v. Ameribank, 247 Mich. App.
133, N.W.2d 328 (2001) 17

Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.,
472 S.E.2d 242 (S.C. 1996) 17, 18

Johnson v. Collins Entm't Co.,
349 S.C. 613; 564 S.E.2d 653 (2002) 17

Noack Enter., Inc. v. Country Corner Interiors of Hilton Head Island,
290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986) 21

Polonetsky v. Better Homes Depot, Inc.,
97 N.Y.2d 46, 760 N.E.2d 1274,
735 N.Y.S.2d 479 (2001) 17

Showpiece Homes Corp v. Assurance Co.,
38 P.3d 47 (Colo. 2001) 17

Tilley v. Pacesetter Corp.,
333 S.C. 33, 508 S.E.2d 16, 19 n.6 (1998) 17

FEDERAL STATUTES

Community Reinvestment Act,
12 U.S.C.A. § 2901 (2003) 14

Federal Trade Commission Act,
15 U.S.C. § 45(a)(1) (2003) 17, 24
Section 5(a)(1) 17

Home Ownership and Equity Protection Act
(HOEPA) (2003) 15, 16, 19
15 U.S.C. § 1602(aa) 15
15 U.S.C. § 1602 (aa)(1)(A) 15
15 U.S.C. § 1602 (aa)(1)(B) 15
15 U.S.C. § 1639 (c)-(I) 15

Federal Arbitration Act,
9 U.S.C. § 1 (2003) 24

STATE STATUTES

Cal. Fin. Code § 4970 (2003) 19

DC Code § 26-1151(2002) 19

Ill. Admin. Code tit. 38, §1050.110 (2003) 19

N.C. Gen. Stat. §24-1.1E (2003) 19, 20

N.C. Gen. Stat. §24-10.2 (2003) 19

N.Y. Comp. Codes & Regs. Tit. 3 §41.1 (2003) 19

S.C. Code Ann. § 37-1-102 (2002) 17, 18

S.C. Code Ann. § 37-10-102 (2002) 17, 18

S.C. Gen. Assemb. H.B. 3616 (2003) 18

Tex. Const. Art. 16, §50(a)(6) 19

Va .Code Ann. 6.1-413 (2003) 19

REGULATIONS AND RELATED AUTHORITY

65 Fed.Reg. 81438 (2000) 6

65 Fed. Reg. 42889 (2000) 15

MISCELLANEOUS

James H. Carr & Jenny Schuetz, Fannie Mae Foundation,
Financial Services in Distressed Communities: Issues and Answers (Aug. 2001), *available at*
http://www.fanniemaefoundation.org/programs/
financial.PDF 13

Center for Community Change, *Risk or Race? Racial Disparities and the Subprime Refinance Market* (May 2002), *available at* http://www.community
change.org/NRP/riskorrace.asp 10, 11

Consumers Union, *In Over Our Heads: Predatory Lending and Fraud in Manufactured Housing* (February 2002), *available at* http://www.consumersunion.org/
other/mh/overinfo.htm 8

Consumers Union, *Women in the Subprime Market* (2002), *available at* http://www.consumersunion.org/finance/
women-rpt1002.htm 11

Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex.L.Rev. 1255 (May 2002) 16

Keith Ernst, John Farris, Eric Stein, *North Carolina's Subprime Home Loan Market After Predatory Lending Reform: A Report from the Center for Responsible Lending* (Aug. 13, 2002), *at* http://predatorylending.org/pdfs/081302_CRL_study_FINAL.pdf. 20

Anna Beth Ferguson, *Predatory Lending: Practices, Remedies and Lack of Adequate Protection for Ohio Consumers*, 48 Clev. St. L. Rev. 607 (2000) 19

Jean Ann Fox, Consumer Fed'n of Am., *The Growth of Legal Loan Sharking: A Report on the Payday Loan Industry* (1998) 6

Jean Ann Fox, Consumer Fed'n of Am., *Safe Harbor for Usury: Recent Developments in Payday Lending* (1999), *available at* www.consumerfed.org. 6

George Gaberlavage & Sharon Hermanson, AARP Pub. Policy Inst., *The Alternative Financial Services Industry* (2001), *available at* http://research.aarp.org/consume/dib51_finance.pdf 6, 9

George Goehl & Gordon Mayer, *Preying on Neighborhoods, Subprime Lending and Chicagoland Foreclosures* (Sept. 21, 1999), *available at* http:www.ntic.us.org/preying/preying.html 6, 12

Deborah Goldstein, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 Harv.C.R.-C.L.L.Rev. 225 (Winter, 2000) 19

Bruce Gottschall, *The View from the Back of the Yards: Summary of Preliminary Analysis of Foreclosure Data* (Nov. 2000) 12

Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. Pub. Int. L.J. 1 (2000) 19

Sharon Hermanson, AARP Pub. Policy Inst. *Older Subprime Refinance Mortgage Borrowers* (July 2002) 10

Hogarth & Hilgert, *A Profile of Consumers With High Rate Home Loans*, Fin. Counseling and Planning, Vol. 13(1) (2002) 6, 14, 15

HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (May 2000) 6, 10

HUD, *Unequal Burden in Chicago: Income and Racial Disparities in Subprime Lending* (May 2000) ... 14

HUD, *Unequal Burden in New York: Income and Racial Disparities in Subprime Lending* (2000), *available at* http://www.hud.gov/library/bookshelf18/pressrel/subprny.html 6, 9, 10

The Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing* (2002) 12

Kellie K. Kim-Sung & Sharon Hermanson, AARP Pub. Policy Inst., *Experiences of OlderRefinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans* (January 2003), *available at* http://research.aarp.org/consume/d83_loans.html 5, 14

Howard Lax, et al., *Subprime Lending: An Investigation of Economic Inefficiency* (Feb. 25, 2000) 9

National Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* §4.7.2 (2nd ed. 2000 & Supp. 2002) 8

National Consumer Law Center, *Unfair and Deceptive Acts and Practices*
§ 1.1 (5th ed. 2001 & Supp. 2002) 16, 17
§ 7.2.1 (5th ed. 2001 & Supp. 2002) 21
§ 8.1 (5th ed. 2001 & Supp. 2002) 21

National Training and Information Center, *Outside the Law: How Lenders Dodge Community Reinvestment* (March 2003), *available at at* http://www.ntic-us.org/currentevents/press/pdf/Outside%20the%20Law.pdf 12, 14

National Training And Information Center, *Slash and Burn Financing: A Study of CitiFinancial's Recent Lending in Chicago* (Dec. 17, 2001), *available at* http:\\www. ntic-us.org/currentevents/press/pdf/Slash%20and%20Burn.pdf 8

Report to Board of Governors of the Federal Reserve System on Predatory Lending Practices in the Home-Equity Lending Market (September 7, 2000), *available at* http://www.ftc.gov/os/2000/09/predatorylending.htm 11, 16

Michael Staten & George Elliehausen, Am. Fin. Serv's Ass'n, *The Impact of the Federal Reserve Board's Proposed Revisions to HOEPA* (July 24, 2001), *available at* http://www.mbaa.org/industry/reports/01/afsa 15, 16

Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. Banking Inst. 111 (April 2002) 19

Eric Stein, A Report from the Coalition for Responsible Lending, *Quantifying the Economic Cost of Predatory Lending* (July 25, 2001,revised October 30, 2001), *available at* http://www.responsiblelending.org/research/quantify.cfm. 11

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 Wm. & Mary L.Rev. 1 (2000) 23

Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. Miami L.Rev. 831 (2002) 23

U.S. Dep't of Treasury & U.S. Dep't of Housing and Urban Development, *Curbing Predatory Home Mortgage Lending: A Joint Report* (2000), *available at* http://www.huduser.org/publications/hsgfin/curbing.html 7, 9, 12, 13

Neal Walters & Sharon Hermanson, *Subprime Mortgage Lending and Older Borrowers*, AARP Pub. Policy Inst., Digest 57,2 (Mar.2001) 9

Odette Williamson, *Protecting Elderly Homeowners from Predatory Mortgage Lenders*, J. Poverty L.& Pol'y 297 (Sept.-Oct. 2000) 5, 9, 13, 14

Alan M. White & Cathy Lesser Mansfield, *Article: Literacy and Contract*, 13 Stan. L. & Pol'y Rev. 233, 266 (2002) 23

Woodstock Institute, *Two Steps Back: The Dual Mortgage Market, Predatory Lending and the Undoing of Community Development* (1999), *available at* http://www.huduser.org/publications/hsgfin/curbing.html 8, 10, 13

No. 02-634

IN THE

Supreme Court of the United States

Green Tree Financial Corp. a/k/a/ Green Tree Acceptance Corp. a/k/a Green Tree /Financial Services Corp. n/k/a Conseco Finance Corp.

Petitioner,

v.

Lynn W. Bazzle and Burt A. Bazzle, et al.

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

AARP is a non-profit organization with more than thirty-five million members dedicated to addressing the needs and interests of people age fifty and older. As the largest membership organization serving older Americans, AARP is greatly concerned about the rampant deception, fraud, and

---

[1] The parties' consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* AARP state that no counsel for any party authored this brief in whole or in part and that no party or entity other than the *amicus curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

unfair practices perpetrated in a broad range of consumer transactions. Older Americans are disproportionately victimized by such practices. AARP thus supports laws and public policies designed to protect their rights and to preserve the legal means for them to seek redress when they are harmed in the marketplace.

AARP, for over a decade, has been concerned about the problem of predatory mortgage lending, which disproportionately targets and adversely impacts elderly and minority borrowers and threatens to undo years of progress in community development across the country. Nearly 80 percent of older Americans are homeowners, and a majority of these older homeowners own their own homes free and clear or have at least $50,000 saved in home equity. Considering the high rate of home ownership and accrued equity among older Americans, the magnitude of predatory lending, and its impact upon older Americans, is enormous. AARP, therefore, has made predatory lending a priority by educating its members, researching issues, litigating cases, and advocating in federal and state regulatory and legislative bodies for laws that protect and provide redress to consumers and deter abusive practices.

AARP is also concerned that concurrent with the rise of predatory lending practices is the pervasive insertion of mandatory and binding arbitration clauses into consumer adhesion contracts. Many lenders and finance companies that are engaging in deceptive and unfair lending practices are also attempting to use mandatory pre-dispute arbitration as a shield from liability. AARP is filing this brief because of grave concern that reversal of the decision below will impede private enforcement of important state laws enacted to protect vulnerable consumers thereby allowing violators of these laws to evade liability.

SUMMARY OF ARGUMENT

The types of lending practices in which Green Tree engaged in this case are typical of the types of deceptive lending practices that have become a burgeoning and devastating problem in recent years. These abusive lending practices are commonly referred to as "predatory" because the loans are

usually sold through aggressive and deceptive sales and marketing. Although predatory lending practices are varied, the most commonly reported forms of abuse are:

1. Providing borrowers with misleading information, manipulating borrowers through aggressive sales tactics, and taking advantage of borrowers' lack of sophistication.

2. Making loans that borrowers cannot afford to repay leading to foreclosure or bankruptcy.

3. Targeting minority, female, elderly and low-income borrowers.

4. Refinancing loans repeatedly over a short period of time through a process known as "flipping," rolling new costs and fees into the loan at each refinancing without benefit to the borrowers.

5. Charging borrowers unnecessary and exorbitant interest rates and fees in loans, including hidden pre-payment penalties, large balloon payments, yield spread premiums, and expensive lump-sum credit insurance premiums.

6. Providing subprime loans with interest rates higher than borrowers should have received.

Once a homeowner's credit has been damaged by the inability to repay high-cost debt, predatory subprime lenders are the only ones willing to make credit available, often on extortionate terms.

Moreover, subprime loans are disproportionately made to elderly and minority borrowers. Indeed, the explosion of subprime lending has replaced prime lending opportunities for many older and minority borrowers, even for those who could qualify for prime loans.

The subprime lending boom has had an adverse impact upon the individuals receiving the loans, their families and the

neighborhoods in which they live. Not only have foreclosure rates soared in recent years, but studies show that predatory lending practices undermine entire neighborhoods. Equity-stripping and foreclosures cause neighborhood instability, depressed property values and increased crime. Abandonment of foreclosed housing also causes local tax revenues to fall, which erodes the funding base for public services.

The explosive growth of predatory lending has occurred largely without any corresponding increase in federal laws and regulatory resources designed to halt the problem. As a result, existing federal laws and regulators are not adequately protecting consumers or preventing the growth of predatory lending abuses. Many states, therefore, have necessarily responded to the emergence of predatory lending practices by enacting additional consumer protection legislation aimed at deterring abusive and deceptive high-cost, non-purchase (refinance) home loans. The laws are a measured and permissible response to a public emergency and are enacted pursuant to the states' police powers. State legislatures allow consumers to enforce these laws as private attorneys general to further the laws' remedial purposes to protect consumers and deter deceptive and abusive trade practices.

Concurrent with the growth of predatory lending is the pervasive use of mandatory binding arbitration clauses in consumer adhesion finance contracts. Petitioners and their *amici* advocate allowing creditors to impose an arbitration system that thwarts consumers' ability to vindicate their rights under state consumer protection laws by barring class actions. The class action remedy is an essential component to enforcing many state consumer protection laws and is a powerful deterrent to wrongful conduct. Indeed, class actions remain the only realistic way for consumers with small monetary claims to vindicate their rights under, and to promote compliance with, laws enacted to protect the public. Without class relief, state consumer protection laws' deterrent and remedial functions would be reduced to nothing more than a mere nuisance to creditors. If consumers are forced into the arbitral forum without the right to seek class-wide relief, creditors will be able to avoid statutory compliance with impunity.

ARGUMENT

I. CONSUMERS NEED PROTECTION DUE TO THE EXPLOSIVE GROWTH OF SUBPRIME LENDING AND THE PREDATORY LENDING PRACTICES EMPLOYED BY SOME SUBPRIME LENDERS

The types of lending practices in which Green Tree engaged in this case are typical of the types of deceptive lending practices that have become a burgeoning and devastating nationwide problem in recent years. These abusive lending practices are commonly referred to as "predatory" because the loans are usually sold through aggressive and deceptive marketing and sales tactics. Kellie K. Kim-Sung & Sharon Hermanson, AARP Pub. Policy Inst., *Experiences of Older Refinance Mortgage Loan Borrowers: Broker- and Lender-Originated Loans* 1 (January 2003) [hereinafter *"Experiences of Older Borrowers"*], *available at* http://research.aarp.org/consume/d83_loans.html. In the instant cases,[2] Green Tree employed "the most pernicious form of solicitation, ... door-to-door salespeople [coming] in the form of home-improvement contractors who [are] working as brokers for mortgage companies." These salespeople "convince elderly homeowners that particular repairs are necessary and that easy financing can be arranged without disclosing the true cost of the loan." *See* Odette Williamson, *Protecting Elderly Homeowners from Predatory Mortgage Lenders*, J. Poverty L.& Pol'y 297 (Sept.-Oct. 2000) [hereinafter "*Protecting Elderly Homeowners*"].

The growth of predatory lending practices coincides with the explosive growth of subprime lending, although not all subprime loans are predatory. Subprime loans are loans made

---

[2] In *Bazzle*, Green Tree violated South Carolina Consumer Protection Code when selling mortgage loans to homeowners paying for home improvement work after being solicited by door-to-door salespeople. Similarly in *Lackey*, Green Tree violated South Carolina Consumer Code when providing financing for manufactured home sales. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 249-50, 254; 569 S.E.2d 349, 352-3, 354 (2002).

at higher interest rates than the prime market rate.[3] Recent studies have shown that the national rate of subprime lending has skyrocketed from the early 1990s. From 1993 to 1998, the number of subprime loans in the United States increased ten-fold, from 80,000 to 790,000. HUD, *Unequal Burden in New York: Income and Racial Disparities in Subprime Lending* 2 (2000) [hereinafter "*Unequal Burden in NY*], *available at* http://www.hud.gov/library/bookshelf18/pressrel/subprny.html. The Federal Reserve Board observes that "the number of subprime loans made by lenders that identify themselves primarily as subprime lenders increased about six times -- from 138,000 in 1994 to roughly 856,000 in 1999." *See* Fed. Reserve Sys. Proposed Rule, 65 Fed. Reg. 81438, 81439 (2000). In the metropolitan Chicago area, subprime loans increased from 3,137 in 1991 to almost 51,000 in 1997, a 1,524 percent increase. George Goehl & Gordon Mayer, *Preying on Neighborhoods, Subprime Lending and Chicagoland Foreclosures* 4 (Sept. 21, 1999) [hereinafter "*Preying on Neighborhoods*"], *available at* http:www.ntic.us.org/preying/preying.html. With the dramatic increase in loan originations, the dollar volume of subprime loans also soared from $35 billion in 1994 to $160 billion in 1999. *See*, HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (May 2000) [hereinafter "*Unequal Burden in America*"], *available at* http://frwebgate.access.gpo.gov/cgi-bin

---

[3] In addition to subprime mortgage lending, other high interest rate loan markets have grown substantially since the early 1990's, including high-rate auto loans with interest rates ranging from 15 to 25 percent, credit cards with interest rates ranging from 20 to 40 percent, payday loans that carry annual percentage rates of 300 percent or more, and rent-to-own transactions with implicit interest rates over 100 percent. Hogarth & Hilgert, *A Profile of Consumers With High Rate Home Loans*, Fin. Counseling and Planning, Vol. 13(1)15 (2002) [hereinafter *Hogarth & Hilgert*; *see also*, George Gaberlavage & Sharon Hermanson, AARP Pub. Policy Inst., *The Alternative Financial Services Industry*, (2001), available at http://research.aarp.org/consume/dib51_finance.pdf; Jean Ann Fox, Consumer Fed'n of Am., *The Growth of Legal Loan Sharking: A Report on the Payday Loan Industry* (1998); Jean Ann Fox, Consumer Fed'n of Am., *Safe Harbor for Usury: Recent Developments in Payday Lending* (1999), *vailable at* www.consumerfed.org.

/getdoc.cgi?dbname=2000_register&docid=00-17520-filed.

Although predatory lending practices are varied, the most commonly reported abuses[4] are:

1. Providing borrowers with misleading information, manipulating borrowers through aggressive sales tactics and taking advantage of borrowers' lack of sophistication. *See* U.S. Dep't of Treasury ("Treasury") & U.S. Dep't of Housing and Urban Development ("HUD"), *Curbing Predatory Home Mortgage Lending: A Joint Report* 17 (2000), [hereinafter *"Treas. & HUD Joint Report"*], *available at* http://www.huduser.org/publications/hsgfin/curbing.html.

2. Making loans that borrowers cannot afford to repay leading to foreclosure or bankruptcy. *Id.*

3. Targeting minority, female, elderly and low-income borrowers. *Id.* at 72.

4. Refinancing loans repeatedly over a short period of time through a process known as "flipping," in which new costs and fees are rolled into the loan at each refinancing with no benefit to the borrowers. Flipping leads to depletion of home equity. *Id.* at 73-74.

5. Charging borrowers unnecessary and exorbitant interest rates and fees in loans, deceptively including hidden pre-payment penalties, large balloon payments, yield spread

---

[4] *See also Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices*, (OCC Advisory Letter 2003-2), *available at* http://www.occ.treas.gov/ftp/advisory/2003%2D3.pdf, for the OCC's description of predatory mortgage lending abuses.

premiums,[5] and expensive lump-sum credit insurance premiums. *Id.* at 79-80, 88-92, 96.

6. Providing borrowers with good credit ratings subprime loans with interest rates higher than they should have received. A recent study found that borrowers with good credit ratings were sold loans with interest rates averaging 17.56 percent, while the industry average for such borrowers was 9 percent. *See* National Training And Information Center ("NTIC"), *Slash and Burn Financing: A Study of CitiFinancial's Recent Lending in Chicago* 8-9 (Dec. 17, 2001), *available at* http:\\www.ntic-us.org/currentevents/press/pdf/Slash%20and%20Burn.pdf.

Predatory and deceptive lending practices are especially rampant in the manufactured home loan market. For example, among other things, purchasers are sold (1) loans they cannot afford, (2) homes worth substantially less than the purchase price, (3) loans packed with insurance, financed "points" and other charges that leave the purchasers with negative equity for the first several years after their purchase. Consumers Union, *In Over Our Heads: Predatory Lending and Fraud in Manufactured Housing* (February 2002), *available at* http://www.consumersunion.org/other/mh/overinfo.htm.

The above-described abuses create a disastrous cycle for many homeowners. Once a homeowner's credit has been damaged by the inability to repay high-cost debt, predatory lenders are the only ones willing to make credit available, often on extortionate terms. *See* Woodstock Institute, *Two Steps Back: The Dual Mortgage Market, Predatory Lending and the*

---

[5] A "yield-spread premium" is defined as an arrangement "whereby the creditor charges a higher rate than it would otherwise impose on a loan, and gives the difference, or some portion of it, to a referring broker." National Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* §4.7.2 (2nd ed. 2000 & Supp. 2002). *See also, Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692, 694 (11th Cir. 1998); and *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001) (*"Culpepper II"*).

Undoing of Community Development 2 (1999) [hereinafter "*Woodstock Inst. Study*"], *available at* http://www.woodstockinst.org/2steps.pdf.

A. Studies Show That Most Subprime Lenders Target Older and Minority Homeowners

The explosion of subprime lending has replaced prime lending opportunities for many older and minority borrowers, even those who could qualify for prime loans. *See* George Gaberlavage & Sharon Hermanson, *The Alternative Financial Services Industry*, AARP Pub. Policy Inst. 6-7 (2001) [hereinafter "*Alternative Financial Services*"], *available at* http://research.aarp.org/consume/ib51_finance.html (noting that between 10 percent and 35 percent of borrowers receiving high cost loans actually qualified for prime loans).

1. Older Homeowners Receive a Disproportionate Share of Subprime Loans

Predatory lenders often target older homeowners because they are likely to have built up significant equity in their homes, may live on fixed incomes and need cash for medical expenses or home repairs, and may be vulnerable to aggressive sales tactics *See Treas. & HUD Joint Report, supra*, at 69-70; *see also Protecting Elderly Homeowners, supra*, at 297. Thirty-five percent of subprime borrowers are age fifty-five or older, according to a report by the Federal Home Loan Mortgage Corp.,[6] commonly referred to as Freddie Mac, cited in HUD's report *Unequal Burden in NY, supra*, at 4. Borrowers age sixty-five or older are three times more likely to hold a subprime loan than borrowers who are thirty-five or younger. *Id.* at 17. Borrowers over forty-five are almost six times more likely to have a subprime loan than thirty-five-and-under borrowers. Neal Walters & Sharon Hermanson, *Subprime Mortgage Lending and Older Borrowers*, AARP Pub. Policy Inst., Digest 57,2 (Mar.2001), [hereinafter "*Older Subprime Borrowers*"], *available at* http://research.aarp.org/consume/

---

[6] Howard Lax, et al., *Subprime Lending: An Investigation of Economic Inefficiency* 9 (Feb. 25, 2000) (unpublished report, on file with AARP).

dd57_lending.html. The AARP study also found that older subprime borrowers are more likely to have had a decrease in income or a serious illness than older prime borrowers, and more likely to be financially inexperienced and unfamiliar with basic loan terminology. *Id.* at 4. This combination of factors makes older borrowers particularly vulnerable. *See also* Sharon Hermanson, AARP Pub. Policy Inst. *Older Subprime Refinance Mortgage Borrowers* 3 (July 2002) (noting that 54 percent of older subprime borrowers reported taking the loan as a result of an ad or sales call that guarantee approval. Far fewer prime borrowers selected their loan company on the basis of such an offer); *Woodstock Inst. Study, supra,* at 8.

2. Racial Minorities And Women Receive a Disproportionate Share of Subprime Loans

Subprime lenders also target sales to minority neighborhoods. According to HUD, minority neighborhoods around the nation are under-served in the refinancing market by prime lenders and disproportionately reliant on subprime lenders thereby creating a classic "dual market," with prime lenders and subprime lenders serving different populations. *See Unequal Burden in America, supra,* at 1-2. In New York in 1998, for example, subprime lending accounted for 60 percent of home refinancing in predominately African American neighborhoods, compared with only 13 percent in predominately white neighborhoods. *See Unequal Burden in NY, supra,* at 3. Woodstock Institute's 1999 study confirms HUD's finding that African American neighborhoods and individuals are more likely to be targeted for subprime loans than their white counterparts. *See Woodstock Inst. Study, supra,* at 29.

This trend continues today, as evidenced in a 2002 study finding that minorities nationwide continue to be much more likely to have subprime loans compared to whites. Center for Community Change, *Risk or Race? Racial Disparities and the Subprime Refinance Market* (May 2002), *available at* http://www.communitychange.org/NRP/riskorrace.asp. The report notes that, while white borrowers had 17.42 percent of conventional refinance loans, black borrowers had 49.28 percent, Hispanic borrowers had 30.33 percent, and Native

Americans had 27.94 percent. *Id.* at 3. Even when accounting for income, upper-income black borrowers "have a higher percentage of subprime loans than do lower-income whites." *Id.* at 8. Moreover, these disparities exist in all regions of the United States, regardless of the size of the urban area. *Id.* at 9, 24-5.

Women also receive a disproportionate number of subprime loans. Women receive a larger percentage of subprime loans compared to men, with Black women receiving the highest share. For example, in Texas in 2000, Black women received subprime loans two and half times more than white men. Consumers Union, *Women in the Subprime Market* (2002), *available at* http://www.consumersunion.org/finance/women-rpt1002.htm.

B. The Aftermath of Predatory Lending Harms Homeowners and Destroys Neighborhoods

1. Predatory Lending Has Led to Increased Residential Foreclosure Rates

U.S. borrowers annually lose $9.1 billion to predatory lending practices. Eric Stein, A Report from the Coalition for Responsible Lending, *Quantifying the Economic Cost of Predatory Lending* 2 (July 25, 2001, revised October 30, 2001), *available at* http://www.responsiblelending.org/research/quantify.cfm. These astronomical losses are caused through excessive foreclosures and lenders stripping equity and charging borrowers higher interest rates than their credit histories would indicate is justified. *Id.* Residential foreclosure rates have dramatically increased largely due to subprime lenders use of "asset-based lending," where a loan is approved based on the homeowner's equity in the secured property, rather than on a borrower's ability to repay the loan. This practice is among the most prevalent and harmful of predatory lending practices. *Report to Board of Governors of the Federal Reserve System on Predatory Lending Practices in the Home-Equity Lending Market* (September 7, 2000) (Statement of Peggy Twohig, Asst. Dir. for Fin. Prac. for the Federal Trade Commission) [hereinafter "*FTC Report to Fed. Reserve* Sys."],

available at http://www.ftc.gov/os/2000/09/predatorylending.htm.

It is no surprise, therefore, that as subprime lending has increased, so have foreclosure rates. For example, the number of foreclosures of high cost mortgages increased nearly 500 percent from 1993-2001. NTIC, *Outside the Law: How Lenders Dodge Community Reinvestment* 8, 12 (March 2003) [hereinafter "*Outside the Law*"], *available at* http://www.ntic-us.org/currentevents/press/pdf/Outside%20the%20Law.pdf. Another study found that foreclosures on high interest rate loans increased more than 400 percent in Chicago from 1993 to 1998. *Preying on Neighborhoods, supra,* at 4, 6 & 20; *Treas. & HUD Joint Report, supra,* at 49-51. Similarly, in Back of the Yards, another Chicago neighborhood, there were 247 foreclosures in a twelve by seventeen block area, representing 11 percent of the 2,338 total structures in the neighborhood. *See* Bruce Gottschall, *The View from the Back of the Yards: Summary of Preliminary Analysis of Foreclosure Data* 1 (Nov. 2000). The neighborhood experienced one foreclosure for every three new mortgages. *Id.* Of these foreclosures, at least 75 percent were attributable to known predatory lenders, the vast majority of them based outside of Illinois and having no depository relationship to the neighborhood.

South Carolina has likewise seen a surge in residential foreclosures stemming from subprime loans. A recent survey conducted by the Mortgage Bankers Association of America revealed that foreclosure rates in South Carolina are breaking prior records. Significantly, the survey found that new foreclosures were started on subprime loans seven to nine times as often as on conventional prime mortgages in the third quarter of 2002. Mortgage Bankers Ass'n, *National Delinquency Survey for 3rd Quarter 2002* (Jan. 3, 2003).

The increase of foreclosures has also been reported in the manufactured housing market, which has seen a "rash of foreclosures . . . and substantially higher default rates among subprime borrowers." The Joint Center for Housing Studies of Harvard University ("Joint Center"), *The State of the Nation's Housing* 18 (2002). The Joint Center noted that the rise in foreclosures among manufactured housing purchasers is

evidence that the recent gains in home ownership among lower-income families may not prove durable. *Id.*

The foreclosure data described above demonstrates the dire economic consequences predatory loans have for individual borrowers and their families. Homeowners lose both their homes and the equity they have built up over the years, usually the only significant asset they have. Even if borrowers manage to keep up with loan payments, the loans strip them of their accrued equity and reduce their household budget for other essential needs. Homeowners are often left with substantial debt that they cannot afford. *See Woodstock Inst. Study, supra,* at 1.

2. Predatory Lending Is Destroying Neighborhoods

The impact of predatory lending extends beyond those individuals and families who have been victimized. Studies show that entire neighborhoods are harmed by predatory lending practices. Equity-stripping and foreclosures take cash out of neighborhoods, shake the confidence of other homeowners, which in turn causes rapid decline of a neighborhood. Foreclosed homes frequently remain vacant for a prolonged period of time leading to neighborhood instability, depressed property values and increased crime. *See Treas. & HUD Joint Report, supra,* at 25. Abandonment of housing also causes local tax revenues to fall, which erodes the funding base for public services. *Protecting Elderly Homeowners, supra,* at 309. *See also, Woodstock Inst. Study, supra,* at 8 (finding that "[p]redatory lending has reached a scale where it has now been recognized as a major community development problem . . .[and][i]t threatens decades of effort in promoting homeownership as a means of wealth creation and neighborhood stabilization."). *See also* James H. Carr & Jenny Schuetz, Fannie Mae Foundation, *Financial Services in Distressed Communities: Issues and Answers* (Aug. 2001), *available at* http://www.fanniemaefoundation.org/programs/financial.PDF.

II. FEDERAL LAWS AND REGULATORS ARE NOT ADEQUATELY PROTECTING CONSUMERS FROM THE HARMFUL EFFECTS OF PREDATORY LENDING AND PREVENTING THE BURGEONING GROWTH OF PREDATORY LENDING

The deregulation of the consumer lending industry in the 1980s has lead the way for the nationwide explosive growth of predatory lending. *Protecting Elderly Homeowners, supra,* at 297. Regulatory oversight has not kept pace with the recent changes in the mortgage lending industry. *Experiences of Older Borrowers, supra,* at 1. For example, because many subprime lenders are not depository institutions, they are subject to less regulation than most prime lenders.[7] Therefore, subprime lenders have more leeway to engage in unscrupulous lending practices, absent strong state regulations to constrain them. *See* HUD, *Unequal Burden in Chicago: Income and Racial Disparities in Subprime Lending* 2 (May 2000). Additionally, the majority of subprime loans are not subject to federal Community Reinvestment Act (CRA) requirements. 12 U.S.C.A. § 2901 (2003). *Experiences of Older Borrowers, supra,* at 1; *Outside the Law, supra,* at 2-3 (finding that fifteen out of the top twenty-five lenders (60 percent) in the U.S. are not strictly regulated by the CRA, and seventeen out of the top twenty-five lenders (68 percent) in low to moderate income census tracts are not strictly regulated by the CRA).

---

[7] "In the U.S., there are effectively several tiers of financial institutions. The mainstream financial institutions include commercial banks, thrifts and savings banks, and credit unions. These institutions are regulated by state and federal authorities and are subject to regular examinations for safety and soundness and compliance with regulations. A secondary tier includes institutions such as finance and loan companies and vehicle finance companies. These institutions are generally not subject to federal examinations, although they are required to comply with state and federal regulations. These second-tier institutions often target higher risk consumers and usually charge higher interest rates." Hogarth & Hilgert, *supra,* at 16.

The primary federal anti-predatory lending law, the Home Ownership and Equity Protection Act (HOEPA), has similarly failed to keep pace with the rise of abusive lending practices. Hogarth, & Hilgert, *supra,* at15. Congress passed HOEPA in 1994 as part of the Truth in Lending Act (TILA) to curtail the growth of predatory mortgage lending targeted at vulnerable consumers. 15 U.S.C. §§ 1602(aa)(2003).[8] Lending in the subprime market, however, has escalated dramatically since the enactment of HOEPA in 1994. *See* Fed. Reserve Sys. Proposed Rule, 65 Fed. Reg. 42889 (2000).

Although HOEPA's passage has helped to provide additional protections for victims of predatory lending, it has not adequately remedied the problem because of its limited scope.[9] When the Federal Reserve Board lowered the HOEPA APR interest rate trigger on first liens from 10 percent to 8 percent, HOEPA's coverage expanded from an estimated 1 percent of subprime loans to 5 percent. *See* Letter from FTC to Board of Governors of the Federal Reserve System of Mar. 9,

---

[8] HOEPA, among other things, prohibits creditors from engaging in certain abusive practices, and requires creditors to provide enhanced disclosures to consumers when making certain high cost loans. 15 U.S.C. §§ 1602(aa), 1639. For example, HOEPA prohibits a covered loan from: (1) including a balloon payment payable in less than five years, (2) including more than two prepayments, (3) including most prepayment penalties, (4) including negative amortization, (5) including an increased interest rate upon default, (6) being made without regard to a borrower's ability to repay the loan, and (7) disbursing funds solely to a home-improvement contractor. 15 U.S.C. §§ 1639 (c)-(i) (2003).

[9] HOEPA covers loans with an APR at the time of consummation that exceeds by more than 8 percentage points the yield on U.S. Treasury securities having comparable maturities at the time the lender made the loan or total points and fees in excess of 8 percent of the total loan amount. 15 U.S.C. §§ 1602 (aa)(1)(A) and (B).

2001 regarding proposed HOEPA amendments, *at* http://www.ftc.gov/be/v010004.htm.[10/]

Currently many lenders, however, price their loans just below the HOEPA triggers,[11/] while retaining abusive lending practices. *FTC Report to Fed. Reserve Sys., supra.*[12/]

III. STATE LAWS SUCH AS S.C. CODE ANN. § 37-1-102 (2002) ENACTED TO PROTECT THE PUBLIC INTEREST PURSUANT TO STATE POLICE POWERS SHOULD BE AFFORDED GREAT DEFERENCE

A. Courts Broadly Construe State Consumer Protection Laws in Order to Effectuate Their Remedial Purpose to Adequately Protect Consumers from Unfair and Deceptive Business Practices

---

[10/] The percent of loans covered by HOEPA under the credit industry's analysis is also very small. *See* Michael Staten & George Elliehausen, Am. Fin. Serv's Ass'n, *The Impact of the Federal Reserve Board's Proposed Revisions to HOEPA* (July 24, 2001), *available at* http://www.mbaa.org/industry/reports/01/afsa (finding that HOEPA covers 37.6 percent of first lien subprime loans).

[11/] Subrpime lenders have compensated for the lower rates by raising lender fees that are not included in the fees and costs trigger. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1308 (May 2002).

[12/] Additionally, the FTC recently recommended the following changes in HOEPA so that the law may better address problems relating to predatory mortgage lending: Including coverage of open-end credit and "spurious open-end credit," limiting or prohibiting practices that are unfair, deceptive, or abusive, prohibiting loan flipping, limiting refinancing of HOEPA loans, limiting refinancing of certain low-rate loans, prohibiting "payable on demand" or "call" provisions, prohibiting asset-based lending, and enhancing disclosures. *FTC Report to Fed. Reserve Sys., supra.*

All fifty states and the District of Columbia have enacted consumer protection statutes with broad applicability to most consumer transactions. The statutes are designed to protect consumers from unfair, deceptive and abusive business practices in the marketplace. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 1.1 (5th ed. 2001 & Supp. 2002). South Carolina, like most states, patterned its statute after the language in Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1) (2003), which provides in relevant part that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *See Johnson v. Collins Entm't Co.*, 349 S.C. 613, 564 S.E.2d 653 (2002). By incorporating the FTC Act's broad and expansive prohibition against unfair or deceptive practices affecting commerce, states enacted laws with potent private remedies providing wide-spread redress for marketplace abuses.

Consumer protection laws, such as S.C. Code § 37-10-102, are broadly interpreted by the courts in order to effectuate the statute's remedial purpose to protect the public from deceptive and unconscionable acts. *E.g., Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16, 19 n.6 (1998); *see also Davis v. NationsCredit Fin. Srvc. Corp.*, 326 S.C. 83, 484 S.E.2d 471, 472 (1997) .[13/] The purpose of South Carolina Consumer Protection Code is to protect consumers against unfair practices by suppliers of consumer credit.[14/] *Fanning v. Fritz's Pontiac-*

[13/] *See also, e.g., Showpiece Homes Corp. v. Assurance Co.*, 38 P.3d 47 (Colo. 2001); *Dressel v. Ameribank*, 247 Mich. App. 133, 635 N.W.2d 328 (2001); *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 760 N.E.2d 1274, 735 N.Y.S.2d 479 (2001); *Smith v. Commercial Banking Corp.*, 866 F.2d 576 (3rd Cir. 1989); *Iadanza v. Mather*, 820 F. Supp. 1371 (D. Utah 1993).

[14/] S.C. Code Ann. § 37-1-102 (2002) provides, in relevant part, that the law shall be liberally construed and applied to promote its underlying purposes and policies, which are:

> (c) to further consumer understanding of the terms of credit transactions and to foster competition among suppliers of consumer credit so that consumers may obtain credit at

(continued...)

Cadillac-Buick, Inc., 472 S.E.2d 242 (S.C. 1996). Green Tree, among other things, willfully and persistently violated South Carolina's Preference Statute, S.C. Code § 37-10-102, which is part of South Carolina's broader Consumer Protection Code, S.C. Code Ann. § 37-1-102 (2002). The Preference Statute was enacted to encourage consumers to have an advocate present at the signing of loan contracts so as to curtail lenders from foisting usurious and deceptive loans upon S.C. citizens.[15] Accordingly, S.C. Code § 37-1-102 should be afforded great deference since it is designed to provide consumers with a powerful remedy to right commercial wrongs.

B. Many States Have Necessarily Enacted Laws Under Their Police Powers in Order to Deter Abusive Lending Practices, Protect Vulnerable Consumers from Unscrupulous Mortgage Lenders and Provide Redress for Victims in Response to the Devastating Effects of Predatory Lending

Since the emergence of predatory lending practices, many states have responded by studying, introducing and enacting additional consumer protections relating to high-cost home refinancing loans. The laws, which are typically an outgrowth of each state's existing consumer protection statute, are a

---

[14] (...continued)
reasonable cost;
(d) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors;
(e) to permit and encourage the development of fair and economically sound consumer credit practices.

[15] On February 25, 2003, the S.C. Gen. Assemb. introduced an anti-predatory lending Bill H 3616 entitled "South Carolina High-Cost and Consumer Home Loans Act." Among other things the Act: (1) Requires applicants for high-cost loans to get credit counseling; (2) Prohibits flipping, the refinancing of a loan without providing a tangible benefit to the borrower; and (3) Requires lenders to evaluate a consumer's ability to repay the debt. http://www.mbaa.org/resources/predlend/.

measured and permissible response to a public emergency and are enacted pursuant to the state's police powers. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (holding that state laws designed to prevent the deception of consumers are well within the scope of a state's police powers).[16] Since 1999, more than thirty-five states and municipalities have either passed or introduced anti-predatory lending laws.[17] Most state laws are modeled after HOEPA and, therefore, do not set a cap on interest rates or fees. Instead, the laws apply only to "high cost" loans using HOEPA type triggers to calculate what loans are covered. Most state laws enacted or introduced prohibit the most egregious aspects of predatory lending, i.e., making unaffordable loans often referred to as asset-based lending, and loan flipping, which strips the equity in the home and often leads to foreclosure. Several states also include prohibitions against financing of points and fees in high cost loans, which deter mortgage brokers and lenders from charging exorbitant loan fees. Other practices prohibited include balloon payments, direct home-improvement disbursements, negative or non-amortizing loans, increased default interest rates, prepayment penalties, financing of credit insurance, encouraging default, and failing to use the borrowers' correct credit score. Anna Beth Ferguson, *Predatory Lending: Practices, Remedies and Lack of Adequate Protection for Ohio Consumers*, 48 Clev. St. L. Rev. 607 (2000); Deborah Goldstein, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 Harv. C.R.-C.L. L. Rev. 225 (Winter, 2000); Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. Banking Inst. 111 (April 2002);

---

[16] In an area of law traditionally occupied by the states, such as the exercise of a state's police powers, the Court begins with the presumption that these laws are not superseded by a federal act unless Congress' intent to preempt is clear and manifest. *California v. ARC America Corp.* 490 U.S. 93, 101 (1989).

[17] *E.g.*, N.C. Gen. Stat. §24-1.1E and §24-10.2. (2003); D.C. Code § 26-1151(2002); Ill. Admin. Code tit. 38, §1050.110 (2003); N.Y. Comp. Codes & Regs. Tit. 3 §41.1 (2003); Tex. Const. Art. 16, §50(a)(6); Va. Code Ann. §§ §§6.1-413, 422-28 (2003); Cal. Fin. Code § 4970 (2003).

Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. Pub. Int. L.J. 1 (2000).[18]

In 1999, North Carolina was first to adopt a comprehensive predatory lending law applicable to high cost mortgage loans. The law prohibits the financing of single premium credit insurance, prepayment penalties for certain loans, and loan flipping. N.C. Gen. Stat. §24-1.1E, §24-10.2. (1999) In 2002, the Center for Responsible Lending released a study regarding the effects of North Carolina's predatory lending law. Using data from the Home Mortgage Disclosure Act (HMDA), industry pricing, secondary market, U.S. Census Bureau and HUD, the Report concludes that predatory lending practices have decreased in North Carolina while maintaining full access to a wide range of credit choices, including subprime loans, for the state's homeowners. Keith Ernst, John Farris, Eric Stein, *North Carolina's Subprime Home Loan Market After Predatory Lending Reform: A Report from the Center for Responsible Lending* (August 13, 2002), *at* http://predatorylending.org/pdfs/081302_CRL_study_FINAL.pdf.

---

[18] The status of pending state laws is changing almost daily. For example, from Jan. - Mar. 2003, bills were introduced in N.Y. (AB 5057/AB 5167), Me. (LD 494, AR HB 1668/HB 4214), R.I. (H8029), Ill. (SB 497, MD SB 574), N.H. (HB 817/SB 99/ SB 122/HB 504), Utah (HB 189), Haw. (HB 1438/HB 1329/HB 374), Ind. (HB1698/HB 1841/SB 478), Ariz. (HB 2468), S.C. (H 3616), Okla. (HB 1585), N.M. (SB 449), Miss. (SB 2830/HB 1458), Idaho (HB 28), Tenn. (HB 1076 /SB 0743/SB 203 /HB 21), Ky. (HB 287), Va. (SB 1103), Mich. (HB 6121), Ga. (HB 146/ SB 53/ SB 78), Tex. (HB 1079 SB 252), Wash. (SB 5671/SB 5672). *See* http://www.mbaa.org/resources/predlend. *See also* Office of Thrift Supervision (OTS) letters of January 2003 (finding that provisions of Georgia's and New York's predatory lending laws do not apply to federal savings associations and their operating subsidiaries), *available at* http://www.ots.treas.gov/docs/77302.html; and http://www.ots.treas.gov/docs/77304.html.

C. Private Attorney General Enforcement Is Pivotal To The Enforcement of State Consumer Protection Laws

Private attorney general lawsuits are necessary to further the remedial purposes of state consumer protection laws. *Noack Enter., Inc. v. Country Corner Interiors of Hilton Head Island*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); *Baierl v. McTaggart*, 245 Wis. 2d 632, 629 N.W.2d 277 (2001) (noting that consumers acting as private attorneys general are a necessary supplement to state enforcement actions given the limited resources available to the state). Every state legislature, therefore, except Iowa, includes a private right of action in its consumer protection law.[19] National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 7.2.1 (5th ed. 2001 & Supp. 2002). Simply legislating prohibited conduct could not, by itself, remedy the vast disparity in bargaining positions between consumers and businesses such as credit finance companies. Private attorneys general actions "ensure the vindication of important rights... ." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J. concurring). Petitioners and their *amici* advocate upsetting this statutory framework by allowing creditors to impose an arbitration scheme that thwarts consumers' ability to vindicate their rights under state consumer protection laws.

---

[19] Most state consumer protection laws also provide for injunctive relief, consequential, multiple, minimum or punitive damages, and attorneys fees in order to encourage consumers to initiate a claim. See National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 8.1 (5th ed. 2001 & Supp. 2002). Congress similarly designed the federal Truth in Lending Act, one of the most significant federal consumer protection laws, to create enforcement through a system of private attorneys general. *See, e.g., Edwards v. Your Credit, Inc.*, 148 F.3d 427 (5th Cir. 1998); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Aquino v. Public Fin. Consumer Discount Co.*, 606 F. Supp. 504, 508 (E.D. Pa. 1985); *French v. Wilson*, 446 F. Supp. 216 (D.R.I. 1978).

1. Class Actions Are an Essential Vehicle for Facilitating Private Attorney General Actions

Consumer claims often are brought for small dollar amounts to remedy deceptive practices aimed at the most vulnerable members of our society. Class actions were designed to be brought by "impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant, one that . . . otherwise might get away with piecemeal highway robbery by committing small violations that were . . . beyond [the] ability or resources [of individual plaintiffs] to remedy." *Jackson v. Check' N Go, Inc.*, No. 99-C-7319, 2000 U.S. Dist. LEXIS 8352 at *9 (N.D. Ill. June 13, 2000).

The Court has endorsed the important role of class actions:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citation omitted). *Accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (reasoning that "[a] critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

2. Arbitration Provisions Inserted Into Consumer Adhesion Contracts That Preclude Class Actions Undermine Private Attorney General Enforcement of Important State Consumer Protection Laws Thereby Thwarting Their Remedial Purpose

a. Concurrent with the Growth of Predatory Lending is the Pervasive Use of Mandatory Binding Arbitration Clauses in Consumer Adhesion Finance Contracts

Concurrent with the growth of predatory lending is the pervasive use of mandatory binding arbitration clauses in consumer adhesion finance contracts. *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. Miami L. Rev. 831 (2002) (noting that companies are increasingly using contracts of adhesion to require consumers to resolve any disputes with the company through private binding arbitration rather than in court.)[20]

The current trend of lenders and other businesses to impose binding pre-dispute arbitration on their customers in order to prevent class action litigation is indisputable. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 Wm. & Mary L. Rev. 1 (2000). Green Tree's employment of this strategy to avoid legal consequences for its lending practices cannot be countenanced. Having successfully forced many lawsuits into the arbitral forum where consumers have challenged Green Tree's lending practices,[21] Petitioners are now actively seeking to undermine private attorney general enforcement of important

---

[20] "Consumer contract law should not be based on the false notion that by signing ... form [adhesion] contracts, the consumer knows of, understands, and has assented to the terms of the writing. New approaches are needed to truly protect consumers and to give judges the ability to police consumer agreements ... [T]he legal system is ... turning a blind eye to the realities of the marketplace and to the fact that consumers cannot understand and do not actually assent to the terms of the consumer contracts they sign." Alan M. White & Cathy Lesser Mansfield, *Article: Literacy and Contract*, 13 Stan. L. & Pol'y Rev. 233, 266 (2002).

[21] *E.g.*, *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir. 1999), *Pridgen v. Green Tree Fin. Serv. Corp.*, 88 F. Supp. 2d 655 (S.D. Miss. 2000), *Green Tree Fin. Corp. v. Holt*, 171 U.S. Dist. LEXIS 11765 (N.D. Ala. 1997).

consumer laws by depriving claimants their right to pursue their claims as class actions. If consumers are forced into the arbitral forum without the right to seek class-wide relief, creditors will be able to avoid statutory compliance with impunity. *See In re Knepp*, 229 B.R. 821, 842 (Bankr. N.D. Ala. 1999) (finding that "[t]he pervasive use of arbitration agreements in consumer contracts could have the effect of eliminating class actions. If class actions are no longer an option, the vast majority of consumer claims involving relatively small sums of money on an individual basis will be left without a remedy").

CONCLUSION

The Federal Arbitration Act, 9 U.S.C. § 1 (2003), *et seq.*, does not preempt consumers' rights to consolidate claims under state consumer protection laws that are enacted pursuant to a state's police powers. Consumers who are required to pursue their consumer claims in arbitration must be afforded their full rights and remedies, including the pursuit of class action claims. As long as these rights, remedies, and protections are not afforded under arbitration agreements, consumers must be permitted their day in court. To find otherwise would leave consumers unprotected and without any recourse from one of the most devastating consumer abuses: the loss of one's home through unfair and deceptive practices. AARP, therefore, urges the Court to uphold the decision below of the Supreme Court of South Carolina.

March 26, 2003

Respectfully submitted,

Stacy Canan*
Deborah Zuckerman
Nina Simon
Jean Constantine-Davis
AARP Foundation

Michael R. Schuster
AARP

601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP

Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

No. 02-634

In The
Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. a/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE and BURT A. BAZZLE, in a representative capacity on behalf of a class and for all others similarly situated, DANIEL B. LACKEY, GEORGE BUGGS, and FLORINE BUGGS, in a representative capacity on behalf of a class and for all others similarly situated,

Respondents.

On Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENTS

STEVE BAUGHMAN JENSEN
Counsel of Record
BARON & BUDD, P.C.
3102 Oak Lawn Ave., Ste. 1100
Dallas, TX 75219
(214) 521-3605

Counsel for Amicus Curiae National Association of Consumer Advocates

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

18 pp

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE CLASS ACTION DEVICE IS AN ESSENTIAL TOOL FOR ENSURING THAT CONSUMERS WITH SMALL CLAIMS HAVE ACCESS TO JUSTICE	3
II. THE CLASS ACTION PROCEDURE COMPLEMENTS AND ENHANCES THE GOALS OF ARBITRATION AND THE FEDERAL ARBITRATION ACT	8
III. WHERE THE ARBITRATION AGREEMENT IS SILENT ON THE ISSUE OF CLASS CERTIFICATION, CLASSWIDE ARBITRATION DOES NOT UPSET THE CONTRACTUAL RIGHTS OF THE PARTIES	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002) 11

Blue Cross of California v. Superior Court, 67 Cal.App.4th 42 (Cal. Ct. App. 1998) 12

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) 9

DeBoer v. Mellon Mortgage Co., 64 F.3d 1171 (8th Cir. 1995) 4

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) 4, 5

Dickler v. Shearson Lehman Hutton, 596 A.2d 860 (Pa. Super. 1991) 10

Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993) 9

Scardelletti v. DeBarr, 265 F.3d 195 (4th Cir. 2001) 9

In re Texaco, Inc. Shareholder Litig., 20 F. Supp.2d 577 (S.D.N.Y. 1998) 5

Ting v. AT&T, 182 F. Supp.2d 902 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 112 (9th Cir. 2003) 8

Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) 5

Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) 4

TABLE OF AUTHORITIES – Continued

Page

SECONDARY AUTHORITIES

Edward Wood Dunham, *The Arbitration Clause as a Class Action Shield*, 16 FRANCHISE L.J. 141 (1997) 7

HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS (3d ed. 1992) 6

William Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250 (1996) 5

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) 6, 7, 10, 13

CHARLES A. WRIGHT & ARTHUR MILLER, 7A FEDERAL PRACTICE & PROCEDURE (2002) 5

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and students whose primary practice involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. From its inception, NACA has focused primarily on issues which concern abusive and fraudulent business practices affecting consumers. Its specific areas of concern include abusive practices by financial institutions in the extension of credit and unlawful practices by mortgage lenders and brokers such as imposing excessive and unreasonable fees and charges on homeowners.

NACA has a particular interest in ensuring that consumers have access to the courts through the powerful procedural tool of the class action. Recognizing the paramount importance of the class device to consumers with small claims, NACA has issued *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, which was published at 176 F.R.D. 375 (1997). NACA files this

---

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

amicus curiae brief to focus this Court on the central importance of the class action device to consumers, and to debunk arguments by Petitioner and its *amici* that class actions are somehow incompatible with arbitration.

SUMMARY OF ARGUMENT

Class actions are a critical tool that permit consumers to seek redress for small claims that would otherwise go uncompensated, and also provide deterrence against corporate misconduct that would otherwise go unpunished. One of the primary purposes of the 1966 amendments to Federal Rule of Civil Procedure 23 was to facilitate consumers' access to the courts in the context of small damages claims. In the absence of the class device, consumers could not pursue many such small claims, either in the context of individual litigation or individual arbitration.

The class device complements the policy goals of arbitration by creating efficiencies and reducing unnecessary, repetitive presentation of claims. Although class certification itself requires judicial intervention and resources of the parties, even in the arbitration context this investment in resources ultimately provides tremendous overall savings by eliminating substantial duplication as compared with individual arbitrations. Classwide arbitrations do not create any due process difficulties that are not routinely resolved by courts in the class litigation context.

In the context of arbitration agreements, like the one in this case, that are silent as to class certification, the rules of contract interpretation should allow for classwide

arbitration. No language in the contract unambiguously suggests that the parties freely and knowingly bargained away any rights to pursue class certification, and class certification is wholly compatible with arbitration. For this reason the right to pursue class certification is different from other procedural rights, such as the right to jury trial, which by necessity are waived when one agrees to arbitrate.

The contractual limitation of the scope of arbitration to "this contract" is ambiguous, and should therefore be resolved against Petitioner, who drafted the agreement. Courts should not assume that a consumer has agreed to waive the right to pursue classwide relief in the absence of contractual language to support such a waiver.

ARGUMENT

I. THE CLASS ACTION DEVICE IS AN ESSENTIAL TOOL FOR ENSURING THAT CONSUMERS WITH SMALL CLAIMS HAVE ACCESS TO JUSTICE.

Consumer class actions serve an important function in our judicial system and can be a major force for economic justice. They often provide the only effective means for challenging wrongful business conduct, stopping that conduct, and obtaining recovery of damages caused to the individual consumers in the class. Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrongdoing businesses would be able to profit from their misconduct

and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable.

This Court has explicitly recognized the primary role the class device serves in ensuring that consumers may access the courts:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. *Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis.* This, of course, is a central concept of Rule 23.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 n. 9 (1980) (emphasis added).

Other federal and state courts have echoed the importance of class actions to consumers. *See, e.g., DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("the purposes behind class actions [are to] eliminat[e] the possibility of repetitious litigation and provid[e] small claimants with a means of obtaining redress for claims too small to justify individual litigation.") (quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert.*

denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975)); *In re Texaco, Inc. Shareholder Litig.*, 20 F. Supp.2d 577, 596 (S.D.N.Y. 1998) ("[u]ndoubtedly, class actions can be 'powerful tools for justice' where they compensate victims of discrimination, provide a means for reforming oppressive governmental institutions and deter wrongful business conduct where individuals, acting alone, would not have the means to sue") (internal citations and quotations omitted); *Vasquez v. Superior Court,* 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) (class actions play a critical role because "[t]he alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices presuppose a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention").

The framers of state and federal class procedure clearly recognized the importance of the class action for consumers. Indeed, one of the primary purposes of the 1966 amendments to Rule 23 was to "mak[e] the Rule 23 action an economically effective procedure for adjudicating numerous similar but small claims." CHARLES A. WRIGHT & ARTHUR MILLER, 7A FEDERAL PRACTICE & PROCEDURE §1756 at 14916 (2002); *see also* William Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1251-55 (1996) (facilitating prosecution of small claims was one of the two primary purposes behind adoption of 1966 amendments to Rule 23). Otherwise, those same consumers would lack any reliable means to pursue relief for such small claims. *Roper*, 445 U.S. at 339 ("Where it is not economically

feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device").

Class actions also serve the important public policy goal of deterring corporate misconduct that would otherwise go unchecked. Often, class counsel and class representatives act as private attorneys general vindicating cumulative wrongs and obtaining significant injunctive relief or institutional change, and requiring disgorgement of illegal profits. *See* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 5.49 & 5.51 (3d ed. 1992). In the absence of the work of these private attorneys general, and in light of the overwhelmed resources of state and federal attorneys general across the country, corporations would effectively be granted license to steal billions from consumers, so long as they could do it a few dollars at a time.

The availability or imposition of arbitration for small consumer claims does not ameliorate the consumers' need for the class device. Often, the same consumer claims that prove too expensive to *litigate* individually are also too expensive to *arbitrate* individually. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 90 n.353 (2000) ("where a class action is excluded from arbitration, it is likely that many if not most of the claimants will not be able to arbitrate their claims").

None of the above is lost on corporate defendants, who naturally seek to avoid class actions in any context as a means to avoid liability altogether. Unsurprisingly, defense counsel and other corporate arbitration advocates

have urged industry to "defend themselves" against class actions through use of mandatory arbitration. As one defense lawyer has written, "the franchisor with an arbitration clause should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, and because arbitrators typically do not issue runaway awards, strict enforcement of an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure." Edward Wood Dunham, *The Arbitration Clause as a Class Action Shield*, 16 FRANCHISE L.J. 141, 141 (1997); *see also* Sternlight, *supra*, at 5 n.2 ("[s]everal commentators have urged companies in various industries to adopt mandatory binding arbitration, at least in part to avoid class actions") (citing Dunham article and four others).

Petitioner's *amicus*, the United States Chamber of Commerce, wrongly argues that in the arbitration context there is no need to make classwide remedies available to consumers. *See* Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner ("Chamber Br.") at 6-9. This is demonstrably untrue. As described above, industry representatives have specifically urged adoption of no-class-action arbitration provisions as a means to "dramatically reduce aggregate exposure." But if class actions were unnecessary to ensure that consumers have adequate access to a remedy, one would *not* expect significant reductions in defendants' aggregate liability when consumers are forced to pursue individual relief. Put another way, if just as many consumers obtained redress individually as would receive relief when they pursued it through a class action, defendants would have no incentive to oppose availability of the class device. This is consistent

with specific findings issued in at least one consumer class action, that "[i]t would not have been economically feasible to pursue the claims in these cases on an individual basis, whether the case was brought in court or in arbitration." *Ting v. AT&T*, 182 F. Supp.2d 902, 918 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 112 (9th Cir. 2003).

Often, as in *Ting*, development of small-value consumer claims requires extensive legal analysis, review of hundreds of thousands of pages of documents, and a significant outlay of time and money. Individual consumers cannot afford to pay attorneys an hourly fee for such work, and attorneys cannot afford to represent individual consumers on a contingency basis without the economies of scale afforded by representing a large group. Moreover, in cases such as this one – where the claims at issue allege that loan documents provided for subprime loans failed to satisfy state statutory requirements – few if any consumers could understand the nature of their claims or prove the wilfullness of the statutory violations without legal counsel. Thus, even in the arbitration context, if the class device is unavailable, many consumers will have no effective remedy for corporate misconduct.

II. THE CLASS ACTION PROCEDURE COMPLEMENTS AND ENHANCES THE GOALS OF ARBITRATION AND THE FEDERAL ARBITRATION ACT.

Because increasing efficiency and eliminating unnecessary costs and delays are among the central purposes of arbitration, the class action constitutes arbitration's perfect procedural partner. As one court recently explained:

> Rule 23 was intended to promote the efficient resolution of claims in cases involving multiple parties with similar claims, to eliminate repetitious litigation, and to avoid inconsistent judgments. To that end, the Rule elaborates comprehensive procedures to be followed in class actions. These procedures represent a careful balancing of the need for efficiency with the need to ensure adequate protection for the individual members of the class, factors not present in non-class action contexts.

Scardelletti v. DeBarr, 265 F.3d 195, 207 (4th Cir. 2001) (quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993)). Petitioner's *amici* readily acknowledge that arbitration, like Rule 23, is intended to act as a more efficient alternative to individual litigation. *See* Chamber Br. at 10-11 (extolling low costs and efficiencies of arbitration); Brief of *Amicus Curiae* Directv, Inc. in Support of Petitioner at 11 (noting that arbitration is "supposed to provide" increased efficiency, low costs, and finality). Moreover, this Court has noted that at least one purpose of the Federal Arbitration Act was to eliminate the costliness and delays of litigation. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

Despite the protests of Petitioner's *amici* to the contrary, classwide arbitration clearly enhances arbitration's goals of efficiency. *Amici* bemoan the fact that judicial resolution of the class certification issue requires more time and money than would otherwise be spent in an individual arbitration. *See* Directv Br. at 11; Chamber Br. at 11; Brief for American Bankers Association, *et al.*, as *Amici Curiae* in Support of Petitioner at 17-18. This is true – any class action will undoubtedly require more time to resolve than any individual case involving an identical

claim – whether in the litigation or the arbitration context. What Petitioner's *amici* conveniently ignore, of course, are the *overall* efficiencies gained by avoidance of repetitious litigation or repeated arbitration of identical common issues.

A typical arbitration case could involve thousands of consumers who purchased a particular product or service from a defendant, with all of the transactions governed by the same contract of adhesion, which contains identical language for each consumer. Individual arbitrations of such claims would require many more resources, and significant duplication of effort, as compared with a single, classwide arbitration. The efficiencies gained by avoiding repetitive, piecemeal resolution of the claims more than outweighs the delays caused by pursuing class certification.

Classwide arbitration does not create any more due process difficulties than are present in any class action case. Courts can and do supervise the class certification inquiry and notice process in the context of arbitration, while leaving the factfinding and substantive decision-making to the arbitrator. *See, e.g., Dickler v. Shearson Lehman Hutton*, 596 A.2d 860 (Pa. Super. 1991). Nothing about class certification in the arbitration context presents inherent difficulties that courts do not commonly encounter and resolve in class action litigation. *See* Sternlight, *supra*, at 51-52 ("[t]he attorneys uniformly reported that the hybrid process [with courts certifying the class and overseeing notice, and arbitrators resolving the merits] had worked relatively smoothly, and that they had not

found the combination of arbitral and judicial decision-making to be inefficient as compared to class action litigation").[2]

III. WHERE THE ARBITRATION AGREEMENT IS SILENT ON THE ISSUE OF CLASS CERTIFICATION, CLASSWIDE ARBITRATION DOES NOT UPSET THE CONTRACTUAL RIGHTS OF THE PARTIES.

All of Petitioner's arguments rest on a single, flawed premise: that permitting classwide arbitration somehow undermines the benefit of the parties' bargain under circumstances where the contract is silent about class certification. In this case, as in many others involving contracts that fail to mention class certification specifically, nothing about the arbitration clause nor the remainder of the contract indicates that the parties freely and knowingly struck *any* bargain with respect to the consumer's right to pursue class certification. This is true for the simple reason that, as described above, class certification and arbitration are not only compatible procedures, they are complementary.

Many procedural rights, such as the right to trial by jury, are necessarily waived by an arbitration agreement even when they are not specifically mentioned, because

---

[2] In the *Lackey* case, unlike *Bazzle*, the arbitrator found that class treatment was appropriate, rather than a court. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 353-54 (S.C. 2002). If this Court determines that court supervision of the class certification inquiry is necessary in the arbitration context, it could remand the *Lackey* case with directions for the state court to assess whether a class should be certified.

assertion of such rights is not possible in the context of an arbitration. By contrast, however, it is absolutely possible to certify a class for arbitration, and nothing about class certification upsets the policies and purposes of arbitration in general or the Federal Arbitration Act specifically. Indeed, as one California court has noted, permitting classwide arbitration actually *advances* the FAA's goal of enforcing agreements to arbitrate, by making it more likely that the parties will actually proceed to arbitration. *See Blue Cross of California v. Superior Court*, 67 Cal.App.4th 42, 63 (Cal. Ct. App. 1998). As noted above, many consumers will *not* proceed with individual arbitrations because of the cost and difficulty in securing counsel to represent them on small claims, while a class action ensures that a far greater percentage of aggrieved individuals will pursue arbitration.

In essence, Petitioner contends in this case that it expressly agreed to avoid classwide arbitration through inclusion of language in the arbitration clause limiting the scope of arbitration to "this contract." Pet. Br. at 42-44. This argument is weak at best. As the court below noted, there is significant ambiguity as to the meaning of "this contract" when the contract at issue is one of adhesion that was used in hundreds of other transactions involving other consumers. Indeed, the ambiguity of the phrase "this contract" is wonderfully illustrated by one of Petitioner's own *amici*. In the *amicus* brief filed by Directv, Inc., it refers *in the singular* to a form "Sales Agency Agreement" that it uses with dealers *(in the plural)* who distribute the company's satellite television services. According to Directv, "[t]hat Agreement" includes an arbitration clause, etc. Directv Br. at 1; *see also id.* at 4 (referring to "[t]he agreement" between Directv and retailers). Obviously, in

this instance, Directv intended "the Agreement" to mean all of the Sales Agency Agreements reached between the company and several thousand retailers. Clearly, a consumer reading Green Tree's contract at issue here could have interpreted the phrase "this contract" the same way.

Professor Sternlight provides several excellent reasons to support her argument that silent arbitration clauses should not foreclose class actions. *See* Sternlight, *supra*, at 88-90. The general rule of contractual interpretation that a court should construe ambiguities against the drafter, together with the policy concerns that inform that rule, provide powerful support for Sternlight's conclusion: "Companies should not be permitted to rely on a silent arbitration clause, which they drafted, to prevent persons on whom the clause was imposed from proceeding by way of class action." *Id.* at 88. Sternlight also points out that there is no reason to disfavor class actions as a matter of policy, given that they are permitted by the rules of procedure, and their practical benefits outweigh their downsides. *Id.* In sum, Sternlight says, "[c]ourts should not laxly assume plaintiffs intended to waive their right to proceed as a class." *Id.* at 91.

CONCLUSION

This Court should affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

STEVE BAUGHMAN JENSEN
Counsel of Record
BARON & BUDD, P.C.
3102 Oak Lawn Ave., Ste. 1100
Dallas, TX 75219
(214) 521-3605

Counsel for Amicus Curiae
National Association of
Consumer Advocates

No. 02-634

Supreme Court, U.S.
FILED
Mar 26 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. A/K/A CONSECO FINANCE CORP.,

Petitioners,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS and FLORENE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND WOMEN EMPLOYED IN SUPPORT OF RESPONDENTS

GARY T. JOHNSON
STUART MEIKLEJOHN
CO-CHAIRS
NORMAN REDLICH
TRUSTEE
BARBARA R. ARNWINE
THOMAS J. HENDERSON
MICHAEL FOREMAN
AUDREY WIGGINS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 NEW YORK AVENUE, NW
SUITE 400
WASHINGTON, DC 20005-2124
(202) 662-8600

RICHARD T. SEYMOUR
Counsel of Record
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
1100 New York Avenue, NW
Suite 1080 – West Tower
Washington, DC 20005-3934
(202) 582-1000

PAUL W. MOLLICA
METES, MULDER, BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, IL 60604
(312) 263-0272

Additional Counsel listed on inside cover

BEST AVAILABLE COPY

DENNIS C. HAYES
GENERAL COUNSEL
YOLANDA Y. RILEY
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Fifth Floor
Baltimore, MD 21215
(410) 486-9191

VINCENT A. ENG
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
(202) 296-2300

CARYN BECKER
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street
30th Floor
San Francisco, CA 94111-3339

ELAINE R. JONES
DIRECTOR-COUNSEL
NORMAN J. CHACHKIN
ROBERT H. STROUP
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
16th Floor
New York, NY 10013-2897
(212) 965-2200

JUDITH L. LICHTMAN
JOCELYN C. FRYE
NATIONAL PARTNERSHIP FOR WOMAN & FAMILIES
1875 Connecticut Avenue, NW
Suite 710
Washington, DC 20009
(202) 986-2600

Table of Contents

STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
A. The South Carolina Supreme Court's Decision Respects this Court's Precedents Under the Federal Arbitration Act and, Accordingly, Is Not Subject to Further Review 5
B. The FAA Provides No Default Rule Prohibiting Class Arbitration And Which Supersede State-Law Principles Of Contract 9
C. Independently of State Contract Law, the FAA Authorizes Only a Simple Change of Forum, Without the Loss of Any Substantive Right 12
D. Some Claims Require Class Treatment to Vindicate Statutorily Protected Substantive Rights 16
1. Class Litigation Is Sometimes Essential to the Enforcement of the Civil Rights Laws 16
2. Some Claims Are Too Small to Litigate Effectively on an Individual Basis, Even With the Benefit of Fee Award..... 19
3. If a Claim Cannot Be Litigated on a Class Basis in Arbitration, and if Class Treatment is Important to the Prosecution of the Claim, as in Civil Rights and Small-Recovery Cases, Claimants Must Be Allowed to Litigate Their Claims in Court 22
CONCLUSION 23

Table of Authorities

1. Cases

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 15
Allied-Bruce Terminix Cos., Inc. v. Dobson,
513 U.S. 265 (1995) 5, 6
Allison v. Citgo Petroleum Corp,
151 F.3d 402 (5th Cir. 1998), *reh'g denied with explanation*, 151 F.3d 434 (5th Cir. 1998) 18
Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 19
Ameron, Inc. v. U.S. Army Corps of Engineers,
787 F.2d 875 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998) 18
Bailey v. Ameriquest Mortg. Co.,
No. CIV. 01-545 (JRT/FLN),
2002 WL 100391, 145 Lab. Cas. ¶ 34,473
(D. Minn. Jan 23, 2002) 14
Barnes v. Gorman,
122 S. Ct. 2097 (2002) 7
Bazzle v. Green Tree Financial Corp.,
351 S.C.244, 569 S.E.2d 349 (2002) 5, 7, 8, 9, 11
Bresgal v. Brock,
843 F.2d 1163 (9th Cir. 1987) 18
Brooks v. Travelers Insurance Co.,
297 F.3d 167 (2d Cir. 2002) 15
Brown v. Trustees of Boston University,
891 F.2d 337 (1st Cir. 1989),
cert. denied, 496 U.S. 937 (1990) 18
Butler v. Dowd,
979 F.2d 661 (8th Cir. 1992),
cert. denied, 508 U.S. 930 (1993) 18

Califano v. Yamasaki,
442 U.S. 682 (1979) 12, 18
Celestine v. Petroleos de Venezuela SA,
266 F.3d 343 (5th Cir. 2001) 18
Central Wesleyan College v. W.R. Grace & Co.,
6 F.3d 177 (4th Cir. 1993) 11
Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 6
Circuit City Stores, Inc. v. Adams,
279 F.3d 889 (9th Cir. 2002) 15
Cooper v. Federal Reserve Bank of Richmond,
467 U.S. 867 (1984) 17
Daar v. *Yellow Cab Co.*,
67 Cal. 2d 695, 433 P.2d 732 (Cal. 1967) 21
Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 19
Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 6, 10
EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 10, 12, 19
Ferguson v. Countrywide Credit Industries, Inc.,
298 F.3d 778 (9th Cir. 2002) 15
First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995).....6, 9
Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 17
Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 11, 13, 14, 16
Graniteville Co. (Sibley Division) v. EEOC,
438 F.2d 32 (4th Cir. 1971) 18
Green Tree Financial Corp.-Ala. v. Randolph,
531 U.S. 79 (2000) 8, 10, 11, 12, 14 15
Hines v. Davidowitz,
312 U.S. 52 (1941) 10
Hollon v. Mathis Independent School District,
491 F.2d 92 (5th Cir. 1974) 18

Hooters of America, Inc. v. Phillips,
173 F.3d 933 (4th Cir. 1999) 15
Howsam v. Dean Witter Reynolds, Inc.,
123 S. Ct. 588 (2002) 6
In re Cadillac V8-6-4 Class Action,
461 A.2d 736 (N.J. 1983) 21
Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 17
Jenkins v. Raymark Indu.,
782 F.2d 468 (5th Cir.1986) 12
Johnson v. West Suburban Bank,
225 F.3d 366 (3d Cir. 2000) 15
Leonard v. Terminix Int'l Co., L.P.,
2002 Ala. LEXIS 316 (October 18, 2002) 21
Lowery v. Circuit City Stores, Inc.,
158 F.3d 742 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd, Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000) 18
Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6, 8
McDonald v. Washington,
862 P.2d 1150 (Mont. 1993) 21
Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc.,
473 U.S. 614 (1985) 6, 13, 14
Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,
460 U.S. 1 (1983) 14
Murray v. United Food and Commercial Workers Int'l Union,
289 F.3d 297 (2d Cir. 2002) 15
National Center for Immigrant Rights v. INS,
743 F.2d 1365 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987) 18
Paige v. California,
102 F.3d 1035 (9th Cir. 1996) 18

Paladino v. Avnet Computer Technologies, Inc.,
134 F.3d 1054 (11th Cir. 1998) 16
Perry v. Thomas,
482 U.S. 483 (1987) 6, 10
Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,
388 U.S. 395 (1967) 10
Robinson v. Metropolitan-North Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) 17
Sharpe v. Cureton,
319 F.3d 259 (6th Cir. 2003) 18
Southland Corp. v. Keating,
465 U.S. 1 (1984) 5, 6
State ex rel. Dunlap v. Berger,
211 W.Va. 549, 567 S.E.2d 265 (W. Va.), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002) 21
Thiessen v. General Electric Capital Corp.,
267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 2614, 153 L. Ed. 2d 799 (2002) 17
Ting v. AT&T,
182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003) 14
USA Check Cashers of Little Rock, Inc. v. Island,
349 Ark. 71, 76 S.W.3d 243 (Ark. 2002) 21
Vasquez v. Superior Court,
4 Cal. 3d 800 (1971) 21
Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,
489 U.S. 468 (1989) 6, 8, 9, 10
Zepeda v. INS,
753 F.2d 719 (9th Cir. 1983) 18

2. Statutes and Rules

Age Discrimination in Employment Act 11, 14, 15, 16
Americans with Disabilities Act 15
ERISA 15
Fair Labor Standards Act.....22
Family and Medical Leave Act.....2
Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.....*passim*
Pregnancy Discrimination Act.....2
Title VII of the Civil Rights Act of 1964 15
Truth in Lending Act.....15
42 U.S.C. § 1981 .....15, 16
Rule 23, Fed. R. Civ. Pro. 11, 12, 20, 22
Rule 23(f), Fed. R. Civ. Pro. 22

3. Treatises and Law Reviews

Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932) 9
Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931) 9
CHAFEE, SOME PROBLEMS OF EQUITY (1950) 9
Davies, *Federal Civil Rights Practice In The 1990's: The Dichotomy Between Reality And Theory*, 48 HASTINGS L.J. 197 (1997) 21
Developments in the Law—Multiparty Litigation in the Federal Courts, 71 HARV. L. REV. 874, 928–41 (1958) 9
Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518 (1947) ...9
Note, *Action Under the Codes Against Representative Defendants*, 36 HARV. L. REV. 89 (1922).....9
RESTATEMENT (2D) OF CONTRACTS, § 204, comment d 7

Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) 20
STREET, 1 FEDERAL EQUITY PRACTICE (1909) 9
Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934) 9
7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (1986) 20
7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 (Supp.1983) 21
7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 (1986) 20
Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980) 9

STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious and ethnic bias.

---

[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the amici state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the amici and their counsel, made any monetary contribution to its preparation or submission.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation formed to assist African Americans in securing their constitutional and statutory rights through the prosecution of lawsuits, including class actions, and to provide legal services to African Americans suffering injustice by reason of racial discrimination.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The National Partnership for Women & Families ("National Partnership") is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies, EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

One of the principal objectives of amici is to protect the ability of minorities, women, and the poor to obtain effective civil redress for injuries, whether in arbitration or through the courts.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court has examined and authoritatively construed the arbitration agreement used here pursuant to general principles of state law, and has found that it does allow the arbitration of class claims. Its determination of state law and construction of the contract should not be subject to further review by this Court.

Petitioner's argument that the Federal Arbitration Act creates a default rule, overriding state contract law and forbidding arbitration of class claims where the arbitration agreement is silent, has no basis in the text or policy of the statute, and would constitute a judicial rewriting of the statute. The decision below advances the policy of the FAA, and was sound.

The FAA authorizes only a simple change of forum, without the loss of any substantive right under state or federal law. This Court has recognized that the right of the EEOC to bring an action seeking relief for a charging party is a substantive right, and that excessive costs may

jeopardize substantive rights by effectively precluding resort to arbitration. The ability of a private party to litigate a claim effectively is no less a substantive right. In select cases, the ability to proceed collectively may likewise be essential to vindicate effectively a substantive right.

Class treatment is sometimes essential to the enforcement of the civil rights laws. Proof of a pattern of discrimination may be critical to victims' ability to prevail. The additional discovery in class proceedings is often necessary in order to prove the pattern and to establish a structure whereby victims can be identified and made whole. Finally, broad injunctive relief is often necessary to eradicate discrimination, but may be unavailable outside the context of a class proceeding. Additionally, as this Court and commentators have often observed, class treatment is also essential to the vindication of class members' rights where the amounts at stake are too small to justify individual litigation. Even with the benefit of fee-shifting statutes, these cases are economically less desirable than cases in which substantial recoveries or broad injunctive relief are at stake. A blanket rule prohibiting class based arbitration accordingly would have a detrimental impact on the ability of victims of civil rights violations and plaintiffs with small monetary statutory claims from having their substantive rights vindicated.

For these reasons, if a class claim cannot be litigated in arbitration but class treatment is important to the prosecution of the claim, such as in civil rights cases and small-recovery cases, claimants must be allowed to litigate their claims in court.

ARGUMENT

A. The South Carolina Supreme Court's Decision Respects this Court's Precedents Under the Federal Arbitration Act and, Accordingly, Is Not Subject to Further Review

The present case involves the South Carolina Supreme Court's application of South Carolina's contract law to a claim in arbitration founded on South Carolina's consumer law. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 265, 569 S.E.2d 349, 360 (2002) Resolution of this matter in respondent's favor entails a straightforward application of this Court's established jurisprudence applying state-law contract law to interpret the scope of arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). Green Tree, however, petitions the Court to create a new, preemptive rule of contract construction, barring class arbitration unless explicitly commanded by the written instrument. Because this rule lacks any basis in the FAA or this Court's decisional law, Green Tree's argument ought to be rejected and the South Carolina Supreme Court's judgment affirmed.

The role of state law under the Federal Arbitration Act is an enduring, if troubled, theme of the Court's recent FAA cases. Nearly twenty years ago, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court held that the FAA applies in proceedings in state courts and preempts contrary state anti-arbitration laws. The Court has had repeated encounters with the preemption issue, but the path of the law has been questioned. In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), the Court considered the issue anew, and while *Southland* was reaffirmed, three separate opinions urged that the holding in *Southland* was in error and that the FAA should not be deemed preemptive. *Id.* at 282 (O'Connor, J. concurring); *id.* at 284 (Scalia, J., dissenting);

id. at 285 (Thomas, J., dissenting).[2]

Yet side-by-side with these cases, the Court has held unanimously that state—not federal—contract law governs the interpretation of arbitration agreements. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (to decide "whether the parties agreed to arbitrate a certain matter," courts apply "ordinary state-law principles that govern the formation of contracts"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 (1995) (applying New York and Illinois law); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989) ("general state-law principles of contract interpretation [apply] to the interpretation of an arbitration agreement within the scope of the Act"); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original). Although the parties' intent controls regarding whether they agreed to arbitrate a particular dispute, determining their intent is a question for the court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Especially when interpretation of the contract arises from the state's highest court, its ruling deserves special deference. *See, e.g., Mastrobuono*, 514 U.S. at 60 n.4 (citing to *Volt*

[2] *See also Circuit City Stores, Inc. v. Adams*, 532 U.S 105, 122 (2001) (acknowledging that "[n]ot all of the Justices who join today's holding agreed with *Allied-Bruce*"); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting "for the reasons given in my dissent last Term in *[Allied-Bruce]*"); *Perry v. Thomas*, 482 U.S. 483, 493–94 (1987) (Stevens and O'Connor, J.J., dissenting) (doubting the original outcome in *Southland*).

Info).

This is a classic "missing-term" case. Green Tree's arbitration contract form by all accounts fails to address class arbitration. As the Court noted last Term, courts have taken varying approaches to filling missing terms in contracts. *Barnes v. Gorman*, 122 S. Ct. 2097, 2102 (2002) ("Some authorities say that reasonably implied contractual terms are those that the parties would have agreed to if they had adverted to the matters in question. *See* 2 Farnsworth, *supra*, § 7.16, at 335, and authorities cited. More recent commentary suggests that reasonably implied contractual terms are simply those that 'compor[t] with community standards of fairness,' RESTATEMENT (SECOND) OF CONTRACTS § 204, Comment d; *see also* 2 Farnsworth, supra, § 7.16, at 334- 336."). The FAA nowhere dictates a rule for filling in missing terms about either the scope or process of arbitration.

To supply the missing term here, the South Carolina Supreme Court applied its own default rule, applicable to contracts generally, construing silence in the contract against the drafter (Green Tree):

> [U]nder general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. . . . No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order consolidation of claims subject to mandatory arbitration without any contractual or statutory directive to do so.

Bazzle, 351 S.C. at 265, 569 S.E.2d at 360 (citations and footnote omitted). The South Carolina Supreme Court

adopted the same course that this Court took to construe a doubtful choice-of-law clause in *Mastrobuono*, 514 U.S. at 62-63 (applying "the common-law rule that a court should construe ambiguous language against the interest of the party that drafted it").[3]

Because the South Carolina high court's application of its own contract law lies beyond this Court's review, there remains nothing more for the Court to decide. *See, e.g., Volt Info*, 489 U.S. at 474 ("[a]ppellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"). Yet Green Tree makes an effort here to obtain *de novo* review. Its oft-stated contention that the use of terms such as "you," "us," and "this contract" in the agreement preclude class arbitration (Pet. Br. at 38-44) just attempts to resurrect before this Court the state law arguments rejected by the South Carolina Supreme Court. It disregards the state court's conclusion that Green Tree's form language, including the terms cited, "at best . . . creates an ambiguity." *Bazzle*, 351 S.C. at 264, 569 S.E.2d at 359.

Green Tree's back-up argument—that the "arbitration agreement cannot bind non-representative class members who are not parties to the specific arbitration agreements upon which the *Bazzle* and *Lackey* proceedings were predicated" (Pet. Br. at 45)—likewise slights the findings below. Green Tree used a virtually identical form with all of the class members (*id.* at 264 n.18, 569 S.E.2d at 359), and so it was bound by contract to arbitrate with all of them, and all of them with Green Tree. *Id.* at 266, 569 S.E.2d at 360.

---

[3] *See also Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 n.1 (2000) (Ginsburg, J., concurring in part and dissenting in part) (Alabama applies "usage and custom" to fill missing contract terms, where contract did not specify division of forum fees). Petitioner's brief conspicuously omits any citation to *Randolph*.

No class member was dragooned into the proceeding. *Id.* at 269, 569 S.E.2d at 362 ("[t]he class members' rights appear to have been properly protected by the notice given to all of them"). If individual consumers did not wish to arbitrate their claim under the form, they were permitted to opt out of the proceeding. *Id.* at 250, 569 S.E.2d at 352. The decision below is thus insulated from review.

B. The FAA Provides No Default Rule Prohibiting Class Arbitration And Which Supersede State-Law Principles Of Contract

Petitioner also claims that the FAA interposes a mandatory, federal default rule[4] that bars class arbitration unless expressly authorized. Yet the FAA authorizes enforcement of arbitration contracts only upon their own terms, and this contract, as duly construed by the South Carolina courts, authorizes class arbitration. *See, e.g., First Options*, 514 U.S. at 947 ("basic objective" of FAA is to enforce contracts "according to their terms"); *Volt Info*, 489 U.S. at 476 (federal policy under FAA "is simply to ensure

---

[4] Congress wrote no exclusion of class treatment into the FAA, although class actions existed at the time the FAA was enacted. CHAFEE, SOME PROBLEMS OF EQUITY (1950) at 220–42; 1 STREET, FEDERAL EQUITY PRACTICE (1909) § 552; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932); Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931); Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928–41 (1958); Note, *Action Under the Codes Against Representative Defendants*, 36 HARV. L. REV. 89 (1922); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934); Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518 (1947). There is no basis for any contention that Congress was unaware of the possibility of class treatment, or intended *sub silentio* to establish any special rule of the type for which petitioner contends.

the enforceability, according to their terms, of private agreements to arbitrate"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so"). Silence is not a basis on which this Court has previously incorporated optional terms into agreements.[5]

The FAA contains no express terms curbing the availability of class arbitrations under state law. Indeed, as a general matter, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info*, 489 U.S. at 477. The FAA preempts state law only "to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 477–78 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

More particularly, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info*, 489 U.S. at 476. *See also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (state rule governing "efficient order of proceedings" may be enforced).

---

5 This Court has been cautious when the arbitration agreement is silent on a key term. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (refusing to read into silent agreement a term precluding administrative relief of civil rights claim); *Randolph*, 531 U.S. at 90–91 (declining to read into silence a term on the division of forum fees); *Perry*, 482 U.S. at 492 (remanding, rather than deciding, issue of whether employees could press "ancillary claims for conversion, civil conspiracy, and breach of fiduciary duty" in arbitration).

Green Tree complains that the state court's decision transformed its arbitration "into a massive proceeding with millions of dollars at stake and the full trappings of the process under Rule 23" (Pet. Br. at 32). Mere generic attacks on the "practical problems associated with class arbitration," as Green Tree argues (Pet. Br. at 17, 38-42), will not suffice to meet this burden. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (party seeking to avoid arbitration on ground of undue expense has burden to establish factual record and cannot rely on generalities); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (rejecting "generalized attacks" on the arbitration process as applied to a broker's ADEA claim). Surely, petitioner cannot claim prejudice in the fact that the clearly meritorious claims of numerous persons with whom they had agreements were heard and determined. The fact that many such persons might not have asserted a claim in the absence of class treatment is not a legally cognizable burden. Petitioner has made no record showing that it was more expensive or time-consuming to adjudicate the rights of class members in the class arbitral proceeding than in a large number of individual proceedings involving the same common questions, and it would not be reasonable to entertain such an assumption in the absence of evidence.

If anything, the decision below advances rather than retards FAA objectives. *Bazzle*, 351 S.C. at 266, 569 S.E.2d at 361. Class treatment of common issues holds mutual benefits for claimants and respondents. Economies of scale save attorneys' fees and resources that would otherwise be squandered defending numerous individual arbitrations over the same issue. And resolution of a class action in a defendant's favor brings global closure to a disputed issue. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) ("Findings in a common issues trial on even a few of the eight identified questions may

eventually save considerable time and judicial resources. Significant economies may be achieved by relieving educational institutions of the need to prove over and over when defendants knew or should have known of asbestos' hazards, or whether defendants engaged in concerted efforts to conceal this knowledge, or even whether certain of defendants' products crumble and release dust under hand pressure."); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) ("To the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources. Furthermore, attorneys' fees for all parties will be greatly reduced under this plan, not only because of the elimination of so much trial time but also because the fees collected from all members of the plaintiff class will be controlled by the judge."). There is no cause to believe that such advantages would not attend a well-managed class arbitration.

This Court has refused to construe even statutory language discussing individual litigation as creating a presumption against class litigation, holding that Congress would have to express such an intent clearly, because the courts will not infer an intent to exempt particular causes of action from the normal rules of civil procedure, including Rule 23. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Because the FAA is intended to provide only for a change of forum, it would be similarly inappropriate to create a default rule foreclosing a particular manner of litigation.

C. Independently of State Contract Law, the FAA Authorizes Only a Simple Change of Forum, Without the Loss of Any Substantive Right

Although this particular case may be resolved according to state law, the federal FAA itself conveys a separate, substantive, and independent limitation on

arbitration agreements and their interpretation: that they not impede a claimant from effective vindication of federal or state statutory rights. This Court traced the dividing line in *Waffle House*:

> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. "In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' [*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985)]." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

534 U.S. at 295 n.10. Twice in recent Terms, the Court recognized circumstances where the FAA would not compel enforcement of arbitration agreements that invaded a claimant's ability to vindicate substantive rights. In *Waffle House*, the Court held that this principle would preclude judicial construction of "an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit." *Id.* at 295. And in *Randolph*, 531 U.S. at 90, the Court stated, "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." The principle that enforceable arbitration agreements do not involve the waiver of substantive rights applies with equal

force to state statutory claims.[6]

The adequacy of procedures in arbitration is considered on a case-by-case basis. *See, e.g., Randolph*, 531 U.S. at 92; *Gilmer*, 500 U.S. at 33 (claims of procedural inadequacies "best left for resolution in specific cases"). Thus, regarding the availability of class actions, there will be cases where—upon inquiry into the particular arbitration clause and facts of the case—the class procedure may be integral to a claimant's vindication of a cause of action in arbitration. *See, e.g., Bailey v. Ameriquest Mortg. Co.*, No. CIV. 01-545 (JRT/FLN), 2002 WL 100391, 145 Lab. Cas. ¶ 34,473 (D. Minn. Jan 23, 2002) (finding that collective action was integral to relief in FLSA case: "when all the procedural hurdles contained in the Agreement are considered together—the need to travel to defendant's forum, pay half the costs of the arbitrator, proceed individually rather than collectively, and the limitation of damage recovery, the likely result is obvious: the cost of bringing the claim will quickly outweigh any potential recovery under the Act"); *Ting v. AT&T*, 182 F. Supp. 2d 902, 933 (N.D. Cal. 2002) (under California consumer statute, court found that the contract's restrictions on damages that a successful plaintiff could obtain, and prohibition on joinder of claims through class actions to be unconscionable, because they deprived retail customers of a meaningful remedy), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).[7] Any decision in this case must avoid

[6] *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (discussing § 2 of the FAA in a state-law contract case, the Court stated: "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."); *Mitsubishi*, 473 U.S. at 619–20, involved state as well as federal statutory claims.

[7] Regarding the availability of a class or collective action in arbitration, *Gilmer* came closest to this issue when it addressed collective actions in the ADEA context. 500 U.S. at 32. While holding that the absence of these mechanisms does not inherently preclude arbitration in every ADEA case, the Court also observed that the NYSE rules under review in fact provided for collective proceedings. *Id.*

trammeling on the future case-by-case development of this issue under the FAA.

Those courts that have held that the right to class treatment can be waived have failed to consider or honor the limitation of the FAA that arbitration agreements not impede a claimant from effective vindication of federal or state statutory rights. They generally hold that the parties to an arbitration agreement are free to bargain away judicial remedies, and do not consider—or reject out of hand—the importance of class actions and other judicial remedies to the statutory scheme, and whether the rights in question can be effectively vindicated in the absence of class treatment.[8] This standardless approach is particularly risky in light of the fact that a number of companies have been judicially determined to have crafted agreements or rules that were intended to give them an edge in arbitration they would not be allowed in court, or that precluded remedies that would be available in court.[9]

[8] *E.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (right to seek $500,000 in statutory TILA damages lost in absence of class treatment, but "simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability"), *cert. denied*, 531 U.S. 1145 (2001); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (same); *Randolph v. Green Tree Financial Corp.-Ala.*, 244 F.3d 814, 817–18 (11th Cir. 2001) (even though class actions are important tool under TILA, they can be waived in agreement).

[9] *E.g., Brooks v. Travelers Insurance Co.*, 297 F.3d 167, 170–71 (2d Cir. 2002) (ADEA, ADA, and ERISA); *Murray v. United Food and Commercial Workers International Union*, 289 F.3d 297, 304 (2d Cir. 2002) (Title VII, 42 U.S.C. § 1981); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (Title VII); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 786 (9th Cir. 2002) (Title VII); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891 (9th Cir. 2002)

D. Some Claims Require Class Treatment to Vindicate Statutorily Protected Substantive Rights

1. Class Litigation Is Sometimes Essential to the Enforcement of the Civil Rights Laws

Many individual civil rights actions can fairly be resolved on the basis of facts unique to the claim in question, without any plausible contention that a pattern of discrimination is involved. However, class treatment where there is such a pattern is often essential to vindicate civil rights, from at least three perspectives. First, it enables plaintiffs to obtain the evidence necessary to show a pattern of discrimination going beyond the isolated facts particular to that individual claim. Second, it enables plaintiffs to use the types and scale of proof necessary to show such patterns and to establish a structure by which victims can be identified and obtain relief. Third, one of the principal aims of civil rights actions is the eradication of discrimination, but broad injunctive relief is often unavailable outside the context of a class action.

In *Gilmer*, the New York Stock Exchange rules provided for class arbitrations and allowed awards of equitable relief. This Court accordingly rejected petitioner's argument that his arbitration agreement was unenforceable in that it did not provide for broad equitable relief and collective actions. The opinion observed that ADEA cases can be conciliated individually and that the EEOC can bring class actions. 500 U.S. at 32. That statement does not speak to the fundamental question raised in this case, because petitioner's argument was abstract. He made no showing that he could not effectively vindicate his rights in a purely

(Title VII); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1057–59 (11th Cir. 1998) (Title VII).

individual action.

The discovery necessary to prove a pattern of discrimination is generally unavailable in litigation of an individual claim. Far more discovery is generally allowed in class actions because of the complexity of the case, however, and this additional discovery is often necessary for plaintiffs to make the statistical and other showings that are critical to proving a classwide pattern of discrimination.

Obtaining a just outcome can depend entirely on proof of a discriminatory pattern. For this reason, this Court has identified pattern and practice cases as having unique methods of proof affecting all persons subject to the challenged practice. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 32 (1977). Thus, statistical and other evidence is available to prove such patterns of discrimination. Once such a pattern is established, it creates a rebuttable presumption that each class member was victimized by the discrimination, shifting to defendants the burden of persuasion to establish the contrary.[10]

There is no effective substitute for this classwide approach, because it permits the vindication of rights of persons who were harmed by discrimination but are not aware of it,[11] or courts may refuse to take evidence of

[10] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361–62 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772–73 (1976); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875–76 (1984); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001) ("significant advantage" in ADEA collective action), *cert. denied*, __ U.S. __, 122 S. Ct. 2614, 153 L. Ed. 2d 799 (2002).

[11] The Fourth Circuit has observed that "sophisticated general policies and practices of discrimination are not susceptible to such precise delineation by a layman who is in no position to carry out a full-fledged investigation himself," although "[l]ong observation of plant

patterns of discrimination into account outside the context of a class action.[12]

Moreover, even if individual plaintiffs prove pervasive discrimination, the absence of class certification jeopardizes or bars the kind of systemic injunction that will prevent future wrongs. Many courts have held that broad injunctive relief is prohibited to the extent that it exceeds what is needed to give individual relief to the named plaintiffs.[13]

---

practice may bring the realization that he and his black coemployees are not getting anywhere." *Graniteville Co. (Sibley Division) v. EEOC*, 438 F.2d 32, 38 (4th Cir. 1971).

[12] For example, even where plaintiffs obtain such evidence because of an earlier unsuccessful effort to obtain class certification, and as many as 206 plaintiffs gather together into a consolidated case, one Circuit has held that plaintiffs could not rely on evidence of the pattern of discrimination in litigating their claims because no class had been certified, and then affirmed the dismissal of all 206 plaintiffs' individual claims. *Allison v. Citgo Petroleum Corp*, 151 F.3d 402 (5th Cir. 1998), *reh'g denied with explanation*, 151 F.3d 434 (5th Cir. 1998), followed by *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355–56 (5th Cir. 2001) (same case). In effect, the denial of class certification blinded the court to the type of evidence that was dispositive in *Teamsters*.

[13] *E.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766–67 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999), *reaff'd*, *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Hollon v. Mathis Independent School District*, 491 F.2d 92, 93 (5th Cir. 1974) (*per curiam*); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993); *Zepeda v. INS*, 753 F.2d 719, 727–29 (9th Cir. 1983); *Nat'l Center for Immigrant Rights v. INS*, 743 F.2d 1365, 1371–72 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987); *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987); *Paige v. California*, 102

Nor would the EEOC be able to fill the void that would be left if employers required their employees to sign arbitration agreements that excluded class treatment, and if this Court held that such agreements would be effective even where class treatment is necessary to vindicate statutory rights. As this Court recognized in *Waffle House*, the EEOC has never been able to bring more than a small fraction of the enforcement cases filed annually,[14] and the primary burden of enforcing Title VII has since the beginning been on private plaintiffs.

2. Some Claims Are Too Small to Litigate Effectively on an Individual Basis, Even With the Benefit of Fee Awards

"Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This Court has recently reaffirmed this perception. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), stated that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor (citations omitted)."

Small-claim recoveries are not limited to consumer cases. For example, employment discrimination cases involving denials of promotion ordinarily involve smaller

---

F.3d 1035, 1039 (9th Cir. 1996).

[14] *EEOC v. Waffle House*, 534 U.S. at 290 n.7.

back pay claims than hiring and discharge cases.

In all areas of the law, it is difficult for persons with small monetary claims to find capable counsel. Even with fee-shifting statutes, these cases remain economically less desirable than cases in which substantial recoveries or broad injunctive relief are at stake.

Class actions are for all these reasons commonly seen as indispensable to the goals of Congress in enacting many causes of action. In perhaps the most extensive employment discrimination treatise in common use, Prof. Larson stated: "It now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people. Nowhere is this more evident than in the context of the increased number of actions involving the federal government, labor unions, business and nonprofit associations, civil rights, and consumer groups."[15] Profs. Wright, Miller, and Kane state: "Another important factor indicating the superiority of a Rule 23 action in the consumer protection field is that typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis."[16] State courts have also recognized this reality.[17]

---

[15] 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 at 14–15 (1986) (footnotes omitted).

[16] 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 at 59 (1986); *see also* Jean Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1, 9 (2000) ("The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable" (footnote omitted), and noting that

in a multi-year period since First USA required its customers to sign arbitration agreements, only four customers had made claims against it, while during the same period it invoked arbitration to resolve 51,622 claims against customers); Julia Davies, *Federal Civil Rights Practice In The 1990's: The Dichotomy Between Reality And Theory*, 48 HASTINGS L.J. 197, 236 (1997) ("Despite the existence of individual attorneys whose choice of cases is driven more by ideological commitment than money, the plaintiffs' damages were a factor many survey participants viewed as extremely important in determining what cases they wanted to accept.") (footnote omitted).

[17] *See, e.g.*, *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. 71, 76 S.W.3d 243 (Ark. 2002) (potential recovery to each member of class expected to be relatively small and would not justify contingency fee cases nor cases in which attorneys charge on an hourly basis); *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 715, 433 P.2d 732 (Cal. 1967) ("It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs."); *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971) ("Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct."); *McDonald v. Washington*, 862 P.2d 1150 (Mont. 1993) ("The *Green* court also put into perspective the need for class actions and the type of case which is best litigated as a class action: Equity has long recognized that there is need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed . . . In the instant case, the claims involved would be unremediable without class action status because most are minor in and of themselves.") (citation omitted); *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736 (N.J. 1983) ("[I]ndividual actions or a test case may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members to vindicate their rights by separate actions.") (quoting 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1778 (Supp.1983)). *See also Leonard v. Terminix Int'l Co., L.P.*, 2002 Ala. LEXIS 316 (October 18, 2002) ("This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the Leonards from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration."); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d

3. If a Claim Cannot Be Litigated on a Class Basis in Arbitration, and if Class Treatment is Important to the Prosecution of the Claim, as in Civil Rights and Small-Recovery Cases, Claimants Must Be Allowed to Litigate Their Claims in Court

In the event that a company-drafted arbitration agreement expressly precludes class treatment, or is silent on class treatment and state contract law does not require class treatment, and class treatment is important to the vindication of the claim, there are a number of means of protecting the rights of claimants. One is to do as the lower courts did here, exercising judicial responsibility over the question of class certification and requiring the arbitral process to resolve the merits. Another would be to require the arbitrator to consider whether to certify the class, using the same standards the courts would follow.[18] A third would be to exempt the controversy from the arbitration agreement and have the courts determine the individual and class claims, with the individual claims subject to remand to arbitration in the event that class certification is denied.[19] Any approach

---

265, 278–79 (W. Va.) ("Thus, in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable."), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002).

[18] Federal standards under Rule 23 or, in appropriate cases, collective-action standards under the Fair Labor Standards Act, would be appropriate in cases arising under Federal law and in cases that would if filed in court be removable to the Federal courts. State class action standards would be appropriate for non-removable cases arising under State law.

[19] The availability of Rule 23(f), to test the decision whether to certify the class, is an important assurance of fairness under this approach.

would be sufficient if it preserves the opportunity for consideration of class certification under the standards used by the courts.

CONCLUSION

For the reasons stated above, the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

Richard T. Seymour
Counsel of Record
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
1100 New York Avenue, NW
Suite 1080 - West Tower
Washington, D.C. 20005-3934
Telephone 202-582-1000

Gary T. Johnson
Stuart Meiklejohn
Co-Chairs
Norman Redlich
Trustee
Barbara R. Arnwine
Thomas J. Henderson
Michael Foreman
Audrey Wiggins
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW
1401 New York Avenue N.W., Suite 400
Washington, D.C. 20005–2124
Telephone: 202-662-8600

Paul W. Mollica
MEITES, MULDER, BURGER & MOLLICA
208 South LaSalle Street, Suite 1410
Chicago, Illinois 60604
Telephone: 312-263-0272

Caryn Becker
LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, California 94111-3339
Telephone: 415-956-1000

Dennis C. Hayes
General Counsel
Yolanda Y. Riley
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive, Fifth Floor
Baltimore, Maryland 21215
Telephone: 410-486-9191

Elaine R. Jones
Director-Counsel
Norman J. Chachkin
Robert H. Stroup
NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC.
99 Hudson Street, 16th Floor
New York, New York 10013-2897
Telephone: 212-965-2200

Vincent A. Eng
NATIONAL ASIAN PACIFIC AMERICAN LEGAL
CONSORTIUM
1140 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20036
Telephone: 202-296-2300

Judith L. Lichtman
Jocelyn C. Frye
NATIONAL PARTNERSHIP FOR WOMEN &
FAMILIES
1875 Connecticut Avenue, N.W., Suite 710
Washington, DC 20009
Telephone: 202-986-2600

Attorneys for *Amici Curiae*

(19)

No. 02-634

Supreme Court, U.S.
FILED
Mar 26 2003
MAR 26 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In a Representative Capacity on Behalf of a Class and for All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In a Representative Capacity on Behalf of a Class and for All Others Similarly Situated,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

DAVID S. SCHWARTZ
Assistant Professor of Law
(*Counsel of Record*)
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-6708

RICHARD M. ALDERMAN
Dwight Olds Chair in Law
Executive Director, Center
for Consumer Law
University of Houston
Law Center
100 Law Center
Houston, TX 77204-6060
(713) 743-2165

Counsel for Amici Curiae Law Professors

(Additional amici listed on inside cover. Institutional affiliations listed for identification purposes only.)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

43 pp

ROBERT BELTON
Professor of Law
Vanderbilt University Law School
131 21st Ave. South, Ste. 207
Nashville, TN 37203-1181
(615) 322-2615

JEAN BRAUCHER
Roger Henderson Professor of Law
University of Arizona, James E. Rogers College of Law
1201 E. Speedway
Tucson, AZ 85721-0176
(520) 626-7251

RICHARD B. CAPPALLI
First Charles Klein Professor of Law and Government
Temple University School of Law
1719 N. Broad Street
Philadelphia, PA 19122
(610) 649-7653

PAUL D. CARRINGTON
Harry R. Chadwick Sr. Professor of Law
Duke University School of Law
Science Drive and Towerview Road
Box 90362
Durham, NC 27708-0362
(919) 613-7000

DONALD F. CLIFFORD
Aubrey Brooks Professor
University of North Carolina School of Law
Chapel Hill, NC 27599-3380
(919) 962-8511

CATHERINE FISK
Professor of Law &
William Rains Fellow
Loyola Law School
919 South Albany Street
Los Angeles, CA 90015
(213) 736-1036

DWIGHT GOLANN
Professor of Law
Suffolk University Law School
120 Tremont Street
Boston, MA 02108-4977
(617) 573-8000

JOSEPH R. GRODIN
John F. Digardi Distinguished Professor of Law
University of California, Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 565-4654

PAUL H. HAAGEN
Professor of Law
Duke University School
of Law
Science Drive and
Towerview Road
Box 90360
Durham, NC 27708-0360
(919) 613-7088

JOHN A. KIDWELL
Kathleen M. & George I.
Haight Professor of Law
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53703
(608) 262-2240

PETER LINZER
Professor of Law
University of Houston
Law Center
100 Law Center
Houston, TX 77204-6060
(713) 743-2200

STEWART MACAULAY
Malcolm Pitman Sharp
Professor of Law &
Theodore W. Brazeau
Professor of Law
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53703
(608) 262-2240

STEPHEN E. MEILI
Clinical Associate Professor
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 265-2058

RICHARD C. REUBEN
Associate Professor of Law
University of Missouri-
Columbia School of Law
Missouri Ave. &
Conley Ave.
Columbia, MO 65211
(573) 882-4984

EDWARD F. SHERMAN
Professor of Law
Tulane University School
of Law
John Giffen Weinmann Hall
6329 Freret Street
New Orleans, LA 70118-5670
(504) 865-5939

JEFFREY W. STEMPEL
Professor of Law
William S. Boyd School
of Law
University of Nevada
Las Vegas
4505 Maryland Pkwy.,
Box 451003
Las Vegas, NV 89154-1003
(702) 895-2361

JEAN R. STERNLIGHT
John D. Lawson Professor of Law
University of Missouri-Columbia School of Law
Missouri Ave. & Conley Ave.
Columbia, MO 65211
(573) 882-3614

KATHERINE VAN WEZEL STONE
Professor of Law and Anne E. Estabrook Professor of Dispute Resolution
Cornell Law School and Cornell School of Industrial and Labor Relations
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3626

CLYDE W. SUMMERS
Jefferson B. Fordham Professor of Law Emeritus
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7483

GERALD J. THAIN
Consumer Law Professor
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53703
(608) 262-2240

MAUREEN WESTON
Associate Professor
Pepperdine University School of Law
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-6313

WILLIAM WHITFORD
Professor of Law Emeritus
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53703
(608) 262-2240

WILLIAM J. WOODWARD, JR.
James Beasley School of Law
Temple University
1719 N. Broad Street
Philadelphia, PA 19122
(215) 204-8984

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THIS CASE PRESENTS THE PROPER OCCASION TO OVERRULE *SOUTHLAND*	4
A. Green Tree's Proposed Federal "Enforce as Written" Rule Would Create a Staggering Expansion of FAA Preemption That Must Be Rejected	4
B. Rejection of Green Tree's Position on Narrow Grounds, While Appropriate, Will Leave Numerous *Southland*-Created Problems Unresolved	6
II. "PROPER APPLICATION OF *STARE DECISIS* DOES NOT PREVENT CORRECTION OF THE MISTAKE" OF *SOUTHLAND*	9
A. *Southland's* Unworkable Test for Preemption Has an Unsettling Effect on the Law That Outweighs Any Legitimate Reliance Interests by Private Contracting Parties	9
1. Inherent Contradictions in the *Southland* Preemption Rule Put the FAA in Tension with Itself	9
2. The *Southland*-Based Distinction Between "General" and "Specific" Contract Law Creates Confusion Among Lower Courts about When State Contract Law Is Preempted	13

TABLE OF CONTENTS – Continued

Page

3. *Southland* Has Created Too Much Legal Uncertainty to Create Significant Reliance by Private Parties 17

B. *Southland*'s Basic Premise That the FAA Is Substantive Law Is Contradicted by this Court's Consistent Holdings Since 1985 That the FAA Is Fundamentally Procedural and Affects No Substantive Rights 18

C. *Southland*'s Imposition of a "National Policy Favoring Arbitration" on the States Intrudes on the State-Federal Balance, Raises Constitutional Doubts and Violates the Fundamental Federalism Principles Established in *Gregory v. Ashcroft* 21

1. *Southland*'s Effect of Restructuring State Dispute Resolution Processes Without the Justification of a Strong Federal Interest Raises Doubts about the FAA's Constitutionality 22

2. Federalism Principles Reaffirmed Since *Southland* Caution against Courts Finding Preemption in Reticent Statutes 26

3. This Court's "Clear Statement" Rule Announced in *Gregory v. Ashcroft* Undermines Any Contention that *Southland* Properly Construes the FAA..... 28

TABLE OF CONTENTS – Continued

Page

4. *Southland* Suffers from Constitutional Infirmities Comparable to *Swift v. Tyson* 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner Denver Co., 415 U.S. 36 (1974).....18

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).....*passim*

Amchem Prod. v. Windsor, 521 U.S. 591 (1997)..... 5

Armendariz v. Foundation Health Psychare Servs., 24 Cal. 4th 83, 99 Cal. Rptr. 745 (2000) 14

Arnold v. United Companies Lending Corp., 204 W.Va. 29, 511 S.E.2d 854 (1998) 14

Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 569 S.E.2d 349 (2002) 17

Bradley v. Harris Research, 275 F.3d 884 (9th Cir. 2001).....8, 14, 15, 16

Circuit City Stores v. Adams, 532 U.S. 105 (2001).....19

Discover Bank v. Superior Court, 105 Cal. App. 4th 326, 129 Cal. Rptr. 2d 393 (2003) 5

Doctors Associates v. Casarotto, 517 U.S. 681 (1996).....7, 9, 13, 15

Doctors Associates v. Hamilton, 150 F.3d 157 (2d Cir. 1998).....15

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 996 (1998).....18

Eastman v. Conseco Financing Servs. Corp., Wis. Sup. Ct. No. 01-1743 (2003)..... 8

EEOC v. Waffle House, 534 U.S. 279 (2002).....3, 19

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 27

TABLE OF AUTHORITIES – Continued

Page

English v. General Electric Co., 496 U.S. 72 (1990).....27

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).....29, 30

First Options of Chicago v. Kaplan, 514 U.S. 938 (1995)..... 7

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).....18, 19

Graham v. Scissor Tail, Inc., 28 Cal.3d 807, 171 Cal. Rptr. 604 (1981).....14

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 4, 21, 26, 27, 28, 29

Johnson v. Fankell, 520 U.S. 911 (1997) 23

KKW Enterprises v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999).....15

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).....7, 8

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 3, 18, 19

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983).....18, 20, 25

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 26

New York v. United States, 505 U.S. 144 (1992).....26

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 21

Perry v. Thomas, 482 U.S. 483 (1987) 2, 9, 12, 13, 22

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).....11, 20

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).....3, 10, 17, 19

TABLE OF AUTHORITIES – Continued

Page

Santa Fe Industries v. Green, 430 U.S. 462 (1977) 21

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).....19

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).....10, 22

Southern Pacific Co. v. Jenson, 244 U.S. 205 (1917).....12

Southland Corp. v. Keating, 465 U.S. 1 (1984) .....*passim*

Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).....24, 25

Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).....24

Stewart Organization v. Ricoh Corp., 487 U.S. 22 (1988).....20

Stirlen v. Supercuts, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997).....17

Swift v. Tyson, 42 U.S. (16 Pet.) 1 (1842) 4, 29, 30

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).....25

Ting v. AT&T, 2003 U.S. App. LEXIS 2395 (9th Cir., Feb. 11, 2003) 15, 17

Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 2003 U.S. App. LEXIS 2395 (9th Cir., Feb. 11, 2003).....17

United States v. Lopez, 514 U.S. 549 (1995).....26, 29

United States v. Morrison, 529 U.S. 598 (2000) 26, 29

Volt Info. Sciences v. Stanford Univ., 489 U.S. 468 (1989).....8, 11

TABLE OF AUTHORITIES – Continued

Page

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).....29

West Virginia ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W. Va.), *cert. denied*, 123 S. Ct. 695 (2002).....5, 17

Wilko v. Swan, 346 U.S. 427 (1953).....3, 10, 18, 19

STATUTES AND LEGISLATIVE MATERIALS

28 U.S.C. § 1441.....22

Cal. Corp. Code § 31512..... 9

Cal. Lab. Code § 229 22

Federal Arbitration Act, 9 U.S.C. § 1, et seq. .....*passim*

FAA § 1 2

FAA § 2 ..... 3, 10, 11, 13, 14, 19

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).....11

Judiciary Act of 1789, § 34.....30

Labor Management Relations Act of 1947, § 301(a), 29 U.S.C. § 185.....13

National Labor Relations Act

§ 1, 29 U.S.C. § 151 24

§ 3, 29 U.S.C. § 153 24

§ 10, 29 U.S.C. § 160 24

Securities Act of 1933, § 14, 15 U.S.C. § 77n.....3, 10

Securities Exchange Act of 1934, 15 U.S.C. § 78aa.....24

TABLE OF AUTHORITIES – Continued

Page

Wisconsin Statutes

Wis. Stat. Chs. 214-221 11

Wis. Stat. Chs. 706-709 12

Wis. Stat. § 421.101 et seq. 12

Wis. Stat. § 631 et seq. 12

Wis. Stat. § 704.01 et seq. 12

OTHER AUTHORITIES

P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 731-732 (2d ed. 1973) 20

Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947 (2001) 23

Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction,* 1996 Sup. Ct. Rev. 331 5

William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361 (1988) 29

1 E. Allan Farnsworth, *Farnsworth on Contracts* (3d ed. 1990) 5

Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767 (1994) 26

1 Stewart Macaulay, John Kidwell, William Whitford & Marc Galanter, *Contracts: Law in Action* 37 (1995) 16

5 Ian R. Macneil, et al. *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* app. I:41-44 (5th ed. 1994) 25

TABLE OF AUTHORITIES – Continued

Page

Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1, 42-52 (1999) 23

Restatement (Second) of Contracts § 178 ..... 10, 11, 16

Restatement (Second) of Contracts § 195 10

David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, __ Law & Contemp. Probs. __ (forthcoming 2003), manuscript on-line at <http://www.law.wisc.edu/facstaff/pubs.asp?ID=453> [click on "FAA and Federalism – Download"] 20, 21, 25, 28

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000) 5

Revised Uniform Arbitration Act, National Conference of Commissioners on Uniform State Laws, *Adhesion Arbitration Agreements and the RUAA*, (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm.> 21

U.C.C. preamble, *reprinted in Contract Law: Selected Course Materials* 7 (Burton & Eisenberg, eds. 2002) 16

U.C.C. Art. II 16

U.C.C. § 2-102 16

INTEREST OF AMICI CURIAE

Amici are law professors whose teaching and scholarship involve the fields of alternative dispute resolution, contracts, consumer law, employment law, and civil procedure.[1] Having studied the history and fundamental principles that underlie mandatory arbitration doctrine, and the application of the Federal Arbitration Act in state courts, amici are concerned that the preemption doctrine established in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), has had an unsettling effect on the law, particularly the substantive and remedial state law of contract, that is only increasing over time as *Southland* is expanded into new areas. Amici believe that sound principles of federalism and statutory interpretation compel the conclusion that *Southland* was, and remains, an ill-advised and aberrant decision; and that "proper application of *stare decisis* does not prevent correction of the mistake." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting).

SUMMARY OF ARGUMENT

Petitioner Green Tree Financial Corp. wrote an adhesion contract insisting upon arbitration as a condition of its customers doing business with it. Arbitration is what Green Tree got. This Court could simply say "be careful what you wish for" and send Green Tree on its way. But Green Tree's case is a symptom of a larger problem that

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

will continue to plague lower courts and this Court as long as *Southland Corp. v. Keating*, 465 U.S. 1 (1984), remains the law. *Southland* lends itself to misapplication by lower courts, and to misguided arguments that the Federal Arbitration Act, 9 U.S.C. § 1, et seq., preempts any state law that would regulate any matter that can be written into an arbitration agreement. This Court should overrule *Southland* and hold that the FAA does not apply in state court or preempt state law.

Southland's current vitality has more to do with stare decisis policies than with that decision's merits. Five current members of this Court have written or joined opinions stating that *Southland* was wrongly decided. *See Southland*, 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting) (*Southland* is "unfaithful to congressional intent, unnecessary, and . . . inexplicable"); *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) ("the Court has effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time"); *id.* at 285 (Thomas, J., dissenting) ("In my view, the Federal Arbitration Act does not apply in state courts"). No current member of this Court has had much good to say about *Southland* apart from pointing to the values of stare decisis. For example, Justice O'Connor reluctantly concurred with the *Southland* preemption principle, after twice dissenting from it, because "considerations of *stare decisis* . . . have special force in the area of statutory interpretation" and there appeared to be no "special justification" to overrule *Southland*. *Allied-Bruce*, at 285 (O'Connor, J., concurring) (internal quotations omitted); *see id.* at 272 (majority opinion reaffirming *Southland* on stare decisis grounds without defending decision on its own merits).

Weighty as such stare decisis concerns are, special circumstances do exist for overruling *Southland*. Indeed, the special circumstances are far stronger than those which supported this Court's decision, in the FAA area, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), to overrule the statutory interpretation precedent of *Wilko v. Swan*, 346 U.S. 427 (1953) (construing § 14 of the Securities Act of 1933 to prevent enforcement of pre-dispute agreement to arbitrate securities fraud claims).

First, *Southland* has proven unworkable. Due to its inherent tensions with the FAA § 2 "savings clause," *Southland* has generated a host of preemption questions, has been very difficult to apply with any consistency, and has invited contract drafters to engage in aggressive experimentation in grafting lopsided advantages onto arbitration agreements, thereby unsettling far more private expectations than it has settled.

Second, later cases have in fact eroded *Southland*'s authority by undermining its basic premise, that the FAA is substantive law binding on the states. This Court's arbitrability holdings from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), to *EEOC v. Waffle House*, 534 U.S. 279, 295 (2002), have consistently held that arbitration is not substantive, but is "procedural" in nature, *Rodriguez*, 490 U.S. at 482, and does not affect substantive rights.

Third, despite the frequent repetition of the phrase "national policy favoring arbitration," it remains wholly unexplained just what the *federal* interest is in dictating to states how they will structure their dispute resolution systems for the resolution of *state law claims*. Yet that is the impact of *Southland*, and the constitutionality of such an interpretation of the FAA seems highly questionable. Moreover, FAA preemption nullifies state policy choices on a broad swath of contract issues. By so interpreting the

FAA, *Southland* violates the principle established in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that federal statutes will not be construed to upset the federal/state balance without a clear statement from Congress of such an intent. *Southland*'s use of a quaint 1925 procedural statute as a judicial springboard for the creation of a body of federal substantive law rivals *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842), as one of the great federalism mistakes in the history of this Court's statutory interpretation cases.

ARGUMENT

I. THIS CASE PRESENTS THE PROPER OCCASION TO OVERRULE *SOUTHLAND*

A. Green Tree's Proposed Federal "Enforce as Written" Rule Would Create a Staggering Expansion of FAA Preemption That Must Be Rejected

Green Tree's argument here presses the *Southland* preemption rule to its very limit. According to Green Tree, the FAA creates a substantive rule of contract law that arbitration agreements must be enforced *as written*, notwithstanding any state law which may vary the effect or meaning of specified terms. Pet. Br. at 24-25. This is a truly extraordinary assertion. The net effect would be to give contract drafters like Green Tree a permanent federal exemption from any state contract regulation that could be argued to be waived in an arbitration clause. Today, Green Tree asserts that an arbitration agreement purportedly (though, in fact, not) written to exclude class actions must, as a matter of judge-made FAA law, be enforced in exactly those terms: arbitration without a class action. This in itself would be an extraordinary exemption from state consumer contract regulation, since "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive

for any individual to bring a solo action prosecuting his or her rights." *Amchem Prod. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations omitted); *see* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 28-33 (2000).

Next term, Red Tree will be before this Court, arguing that it is functionally exempt from state-law claims for injunctive relief, or punitive damages or emotional distress damages, because the arbitration agreement precludes such claims and must be enforced "according to its terms." *See, e.g., West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-80 (W. Va.), *cert. denied*, 123 S. Ct. 695 (2002) (drafting party argued that FAA preempts application of state unconscionability doctrine to arbitration agreement purporting to waive punitive damages). Next, Blue Tree will come before the Court arguing that any general state contract law doctrine – be it unconscionability, mutuality of obligation, duress – which would operate to bar enforcement of an arbitration agreement "according to its terms" is nullified by FAA preemption. *See Discover Bank v. Superior Court*, 105 Cal. App. 4th 326, 129 Cal. Rptr. 2d 393, 408 (2003) (suggesting that FAA preempts any departure from enforcing arbitration agreements as written).

Adhesion contracts are often abused by drafting parties who seek unduly to control the rules of future disputes against them, *see, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 334-36, and the most common forms of contract regulation are judicial and legislative responses to limit such abuse of bargaining power. 1 E. Allan Farnsworth, *Farnsworth on Contracts* 517 (3d ed. 1990) ("[I]ncreasing awareness of the need to protect contracting parties against unfair terms has resulted in a plethora of legislation, both state and federal, to supplement the protection afforded by the common law and the Uniform Commercial

Code."). The FAA has been authoritatively construed to permit drafting parties to control only one particular aspect of dispute resolution – the choice of arbitration or court. But it has always been clear – in *this* Court, if not the lower courts – that the FAA expresses no "national policy" against state laws which protect consumers (or employees or other adhering parties) from having unfavorable dispute rules imposed on them distinct from the simple choice of arbitration over litigation. There is no "national policy" favoring oppressive venue clauses, waiver of class action remedies, waiver of damages remedies, one-sided arbitration procedures or other unconscionable terms, even if such terms can be grafted onto an arbitration agreement.

Green Tree's argument proves far too much. A rule requiring enforcement of an agreement literally "according to its terms" does conflict with a rule holding that, for instance, unconscionable terms will not be enforced. And since the enforcement rule is federal and the unconscionability rule state, federal law trumps. Because only a federal common law of contract defenses would withstand this preemption doctrine, Green Tree in effect offers a choice of two unacceptable futures: one in which arbitration agreements are exempt from any review whatsoever for fairness, or, at best, one in which contractual fairness review is completely federalized. Green Tree's argument must be rejected.

B. Rejection of Green Tree's Position on Narrow Grounds, While Appropriate, Will Leave Numerous *Southland*-Created Problems Unresolved

Southland is plainly at issue in this case, as it is in any case claiming FAA preemption of state law. To be sure, the Court could reject Green Tree's argument without reconsidering *Southland*. First, the Court could find that

Green Tree's arbitration clause does not in fact preclude class arbitrations: The contract strongly implies that class actions are permitted, and under *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995), any ambiguity in the agreement should be construed against the drafter.[2] Second, the Court could announce that Green Tree's federal "enforce as written" rule misconstrues the FAA.[3] This Court has never adopted a blanket federal rule of contract law that arbitration agreements are to be enforced "according to their terms" *irrespective of general state contract law*. On the contrary, this Court has been careful to point out that "commercial arbitration agreements, *like other contracts*, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995) (emphasis added, internal quotations omitted). This means that, like other contracts, arbitration agreements are subject to a state's "generally applicable contract defenses" and rules that "arose to govern . . . contracts generally[.]" *Doctors Associates v. Casarotto*, 517 U.S. 681, 687 (1996).[4]

---

[2] "The parties agree and understand that *the arbitrator shall have all powers provided by the law and* the contract. These powers shall include all legal and equitable remedies, including but not limited to, money damages, declaratory relief, and injunctive relief." Pet. Br. at 8 (emphasis added). Since South Carolina law gives arbitrators the power to decide class claims, the contract is most plausibly construed as affirmatively allowing class action arbitrations.

[3] Green Tree relies entirely on its proposed federal "enforce as written" rule; notably, Green Tree does not argue that the FAA itself, independently of contract terms, should be construed to bar class action arbitrations. Indeed, the FAA by its terms takes no position on class actions.

[4] Green Tree misconstrues this Court's decisions when it suggests that this Court intended to make arbitration agreements *more enforceable* than

(Continued on following page)

However, by resolving the case strictly on contract interpretation grounds, the Court would leave unresolved whether Green Tree's proposed federal "enforce as written" rule is implicit in the FAA and will settle no preemption questions at all. By rejecting the "enforce as written" rule without reconsidering *Southland*, the Court would fail to address the nagging, persistent questions about whether federal or state law applies to a host of enforceability questions, such as unconscionability, oppressive venue provisions, and mutuality of obligation. Even the class action question itself would return, with an arbitration clause expressly forbidding class actions: In other FAA cases, Green Tree has argued that a class action right bestowed on consumers by a consumer protection law is preempted by the FAA because *Southland* saves from preemption only "general" contract law, whereas a consumer protection statute is not "general." *See* Brief of Appellant in *Eastman v. Conseco Financing Servs. Corp.*, Wis. Sup. Ct. No. 01-1743, *bankruptcy stay entered* (2003). Some lower courts have bought into this argument, due to confusion about *Southland* preemption doctrine. *See, e.g., Bradley v. Harris Research*, 275 F.3d 884, 890 (9th Cir. 2001). Regrettably, this Court will be called upon repeatedly to

---

other contracts by fully immunizing them from any state regulation on matters peripheral to the arbitration choice itself. While the "according to their terms" language is echoed in *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 477-78 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995), neither of those cases can be read to hold that federal law prevents any reliance on state law to determine the enforceability of arbitration agreements. On the contrary both cases *applied* state law to resolve the issue presented: *Volt* holding that the FAA allowed state law arbitration procedures to be chosen by the parties, and *Mastrobuono* applying the state contract principle that ambiguities will be construed against the drafter. *See Volt*, 489 U.S. at 476-77; *Mastrobuono*, 514 U.S. at 62.

rectify these misapplications of preemption doctrine so long as *Southland* is controlling law.

II. "PROPER APPLICATION OF *STARE DECISIS* DOES NOT PREVENT CORRECTION OF THE MISTAKE" OF *SOUTHLAND*

A. *Southland's* Unworkable Test for Preemption Has an Unsettling Effect on the Law That Outweighs Any Legitimate Reliance Interests By Private Contracting Parties

1. Inherent Contradictions in the *Southland* Preemption Rule Put the FAA in Tension with Itself

Southland has been construed by this Court as creating a rule that state laws that target arbitration agreements for special barriers to enforcement are preempted, whereas "generally applicable contract defenses" and rules that "arose to govern . . . contracts generally" may be applied to arbitration agreements "without contravening [FAA] § 2." *Doctors Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). This distinction between "general contract law" and "arbitration-specific" rules, which reflects internal contradictions in *Southland*, is incoherent and has defied consistent application in all but the clearest cases.

The law held preempted in *Southland* was, in fact, general contract law. The antiwaiver provision in the California Franchise Investment Law provides that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with *any provision* of this law or any rule or order hereunder is void." Cal. Corp. Code § 31512 (emphasis added). The antiwaiver provision does not single out arbitration agreements at all. Adhesion contracts that force the weaker party to waive rights in advance have long been

disfavored under the general judge-made principle that contracts against public policy are void. *See Restatement (Second) of Contracts* §§ 178, 195. When a legislature attaches such an antiwaiver provision to a statute, it does nothing more than exercise its sovereign prerogative to declare public policy, and thereby remind a court to apply the "void as against public policy" doctrine. Construing a generic antiwaiver provision to preclude arbitration of claims under the statute simply applies a general contract principle to the specific instance of arbitration.

Indeed, since *Southland*, this Court has held that such an antiwaiver provision does *not* specifically target arbitration. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), this Court overruled its earlier holding in *Wilko v. Swan,* 346 U.S. 427 (1953), to the effect that a generic antiwaiver provision in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n (a provision virtually identical to the one in *Southland*) precluded enforcement of pre-dispute agreements to arbitrate securities fraud claims. The issue in *Rodriguez* was not preemption, since a federal law was involved, but whether the generic antiwaiver provision was evidence of a specific Congressional intent to preserve the judicial forum against arbitration agreements. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (federal statutory claim not arbitrable if Congress evinces an intent to preclude arbitration). The *Rodriguez* Court determined, in essence, that the antiwaiver language does not specifically target arbitration: "the language prohibiting waiver . . . could easily have been read to relate to substantive provisions of the Act" rather than arbitration. 490 U.S. at 480 (internal quotations omitted). *Rodriguez* thus contradicts *Southland* on this key point.

Southland's holding that a generic statutory antiwaiver provision was preempted also creates an internal conflict in FAA § 2 between the enforcement language and

the modifying proviso "save upon such grounds as exist at law or in equity for the revocation of any contract." FAA § 2.[5] State legislatures' sovereign prerogative to declare public policy has always provided a basis "at law" for "the revocation of any contract." *See Restatement (Second) of Contracts* § 178. By holding otherwise, *Southland* contravened the recognized purpose of the FAA to place arbitration agreements "upon the same footing as other contracts," H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); *accord Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 479 (1989), and "make arbitration agreements as enforceable as other contracts but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

To resolve this contradiction, *Southland* asserted that "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law." 465 U.S. at 16-17 n.11. But this interpretation of § 2 makes no sense. State legislatures do not typically legislate in the "general" terms suggested by *Southland.* Instead, they focus on specific categories of contracts marked by unequal bargaining power and other market failures: consumer contracts, franchise agreements and employment contracts, for example.[6] It would be

---

[5] This language becomes a "savings clause" – in the sense of saving state law from preemption – only as a result of *Southland*'s general rule of preemption. Without *Southland* preemption, the proviso would function simply as a reminder to federal courts to apply state law contract defenses to arbitration agreements, rather than to create federal law.

[6] Any state code provides numerous examples demonstrating that most contract law is subject-specific, rather than "general." For example, Chapters 214 through 221 of the Wisconsin Statutes regulate

(Continued on following page)

inappropriate to make "one-size-fits-all" contract rules for the fundamental reason that, in contract, one size does not fit all. Rules protecting individual consumers or employees from overreaching may be wholly unnecessary to apply to agreements between two large business firms.

Southland's misguided notion of "general contract law" strongly implies that FAA preemption doctrine disfavors state legislation, compared to state judge-made rules. *See Southland*, 465 U.S. at 16 (holding that the FAA was "intended to foreclose *state legislative* attempts to undercut the enforceability of arbitration agreements"). To the extent that "general contract law" means judge-made principles to the exclusion of statutory public policies, *Southland*'s distinction is reminiscent of the now-discredited view of contract law of 100 years ago, in which universal or general principles of common law were "discovered" by courts, and legal rules enacted by legislatures were deemed inferior and dangerous. This view of the law, of course, has been rejected, and wisely so, ever since Holmes first pointed out that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Co. v. Jenson*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

The fundamental incoherence of *Southland's* distinction between general and specific contract law has defied this Court's subsequent efforts to clarify it. In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court stated that "state

---

a variety of business entities – banking institutions, finance companies, car dealers, collections agencies, and others – in ways that control the terms of their contracts. The Wisconsin legislature has created special contracting rules to deal with insurance contracts, real estate contracts, landlord-tenant agreements and consumer contracts. *See* Wis. Stat. §§ 421.101 et seq., 631 et seq., 704.01 et seq., Chs. 706-709.

law, whether of *legislative or judicial* origin" is saved from preemption if it "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *id.* (emphasis added), whereas the FAA preempts only laws targeting arbitration agreements per se: "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Id.*; *accord Doctors Associates*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281. Unfortunately, in correcting *Southland*'s inconsistency with the FAA, the *Perry, Doctors* and *Allied-Bruce* decisions give rise to a contradiction between themselves and *Southland*. If general contract law "of legislative or judicial origin" is saved from preemption by § 2, why would an antiwaiver provision – like the one struck down in *Southland* itself – be preempted?

2. The *Southland*-Based Distinction Between "General" and "Specific" Contract Law Creates Confusion Among Lower Courts about When State Contract Law Is Preempted

Courts and litigants have been turning somersaults to apply the distinction between a "general contract law" and a law which "takes its meaning" from the arbitration clause. This distinction – resulting from the clarification of *Southland*' s basic preemption rule in *Perry* and *Doctors* – has a tendency to break down. Perhaps an arbitration agreement written to preclude class actions or punitive damages can be held unconscionable without having that application of unconscionability doctrine "take its meaning" from the existence of the arbitration clause: Such terms could be unconscionable whether they were attached to an arbitration agreement or not. But what about a state-law principle that an arbitration agreement is unconscionable or otherwise unenforceable because the

obligation to arbitrate is not mutual? *See, e.g., Armendariz v. Foundation Health Psychare Servs.*, 24 Cal. 4th 83, 99 Cal. Rptr. 745, 769 (2000); *Arnold v. United Companies Lending Corp.*, 204 W.Va. 29, 511 S.E.2d 854, 861 (1998). Provisions holding that the drafting party has the exclusive right to choose the arbitrator have also been held unconscionable under general state contract law. *See, e.g., Graham v. Scissor Tail, Inc.*, 28 Cal.3d 807, 171 Cal. Rptr. 604, 615-17 (1981). These applications of unconscionability doctrine clearly "take their meaning" from the existence of the arbitration clause. Are they preempted?[7]

Moreover, the concept of "generally applicable contract law" lends itself to misapplication. For example, in *Bradley*

[7] The difficulty in applying the "general/specific" distinction is reflected in the difficulty courts have had in explaining it. Amici respectfully submit that this Court's explanatory effort in *Allied-Bruce*, for example, is itself potentially confusing:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.

513 U.S. at 281. The second sentence simply cannot mean what it sounds like. An arbitration agreement may be unfair under general contract law principles even if its basic terms are fair: a consumer contract may establish a reasonable sales price, but provide that future disputes will be arbitrated in Borneo before a panel of arbitrators chosen by the seller, with the consumer to pay a $1 million forum fee for his arbitration claim. Unconscionability doctrine recognizes that facts creating substantive contractual unfairness may differ not only from case to case, but also from term to term within a single contract. A great deal of unfairness in contracts stems not from the basic price bargain, but from subsidiary terms buried in the fine print – typically, terms seeking to gain an unfair advantage in potential future disputes.

v. Harris Research, 275 F.3d 884 (9th Cir. 2001), the court misapplied the concept to hold that a state statute barring unfair venue provisions in franchise agreements was preempted by the FAA. The court acknowledged that the state venue statute did not "single out" arbitration and would have applied irrespective of the presence of an arbitration agreement. But the court nevertheless concluded that "general" contract law under *Doctors Associates* means a law that applies to *every* contract, whereas the California statute "applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.' " 275 F.3d at 890. Accordingly the court held the venue statute preempted by the FAA.

Bradley errs by extending *Southland*'s "general/specific" distinction to a provision that does not apply directly to the basic contractual arbitration-over-litigation choice at all. A growing number of cases make this same error. *See Ting v. AT&T*, 2003 U.S. App. LEXIS 2395, at *59 (9th Cir., Feb. 11, 2003) (provision of California consumer protection statute prohibiting contractual waiver of class action remedy is preempted because consumer protection statute is not "general contract law"); *KKW Enterprises v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999) (holding FAA preempts venue provision in state franchise law); *Doctors Associates v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same).

These holdings threaten to undermine broad swaths of state contract regulation. Like Green Tree's proposed federal "enforce as written" rule, *Bradley*'s application of the "general/specific" distinction would have the effect of turning arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. An arbitration agreement could be written to mandate a waiver of injunctive relief, compensatory damages or attorneys fees guaranteed by a state consumer or antidiscrimination statute:

because those statutes are not "general contract law," they would be preempted and the arbitration agreement "enforced as written" under the *Bradley* analysis.[8]

The *Bradley* definition of "general contract law" is incoherent, because even apparently general contract defenses take their meaning from application to specific factual settings. A court is no more likely than is a legislature to find the need to apply protective doctrines like unconscionability to agreements freely negotiated between, say, Green Tree and Citibank, yet both the court and the legislature might well seek to apply an unconscionability protection to an individual consumer doing business with either of those firms. Moreover, the suggestion that there are general contract defenses that are wholly distinct from statutes creating public policies as to specific categories of contracts makes no sense. "General" contract law holds that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable." *Restatement (Second) of Contracts* § 178(1).

[8] The Uniform Commercial Code, which has been adopted in some form in 49 states, is about as "general" as contract law gets. *See* 1 Stewart Macaulay, John Kidwell, William Whitford & Marc Galanter, *Contracts: Law in Action* 37 (1995). Yet even the U.C.C. would fail the "test" for generality adopted in *Bradley* and similar cases: the U.C.C. does not apply to "all contracts" – even taking all nine of its articles together – but rather is limited to "certain" commercial transactions. *See* U.C.C. preamble, *reprinted in Contract Law: Selected Course Materials* 7 (Burton & Eisenberg, eds. 2002). The limited scope of the U.C.C. is even more apparent when viewing its various articles separately: Article II of the U.C.C., of course, limits its scope to transactions in goods. *See* U.C.C. § 2-102.

3. *Southland* Has Created Too Much Legal Uncertainty to Create Significant Reliance by Private Parties

Few legitimate expectations are settled by *Southland*. On the contrary, it is clear that, in the past several years, corporate drafters of arbitration agreements have not been resting on settled expectations, but have been aggressively experimenting with arbitration agreements to find new ways to use them to limit their customers' or employees' remedies against them. *See, e.g., Ting v. AT&T*, 182 F. Supp. 2d 902, 924-28 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 2003 U.S. App. LEXIS 2395 (9th Cir., Feb. 11, 2003) (arbitration agreement purported to limit liability for willful misconduct, limit or bar compensatory and punitive damages, preclude class actions, and impose secrecy requirements); *Stirlen v. Supercuts*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138, 142-43 (1997) (arbitration agreement purported to require adhering party to waive tort damages and attorneys fees, while leaving drafting party free to pursue claims in court). The case at bar provides a telling illustration. Green Tree cannot reasonably have a "settled expectation" about whether its arbitration agreement will prevent class actions being brought against it, because the issue has produced contrary results. *Compare Bazzle v. Green Tree Financial* Corp., 351 S.C. 244, 569 S.E.2d 349 (2002) (allowing class arbitration); *Berger*, 567 S.E.2d at 279-80 (same), *with Ting*, 2003 U.S. App. LEXIS 2395, at *59 (FAA preempts state law preserving right to class action). Between drafting parties' efforts to "push the envelope," and confusion in the lower courts, *Southland* has put the law of arbitration too much in flux to create settled expectations.

Finally, it is worth pointing out that the "settled expectations" of the adhering parties have not prevented this Court from overruling other FAA precedents. In *Rodriguez*, 490 U.S. 477, this Court overruled the 36-year-old statutory

interpretation case of *Wilko v. Swan*, 353 U.S. 427 (1953), on the ground that *Wilko* had fallen out of step with the Court's subsequent views about arbitration, notwithstanding the settled expectations of securities customers that their fraud claims against brokerages could be brought in court. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court did not pause over the expectations of employees that had formed over 17 years around the near-unanimous understanding of the lower courts that *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974), preserved the judicial forum for statutory civil rights claims. *See, e.g., Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir.), *cert. denied*, 525 U.S. 996 (1998) (citing cases applying *Alexander* to bar enforcement of non-union predispute arbitration clauses in employment discrimination cases); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting) (majority decision overrules unanimous view of Courts of Appeals that antitrust claims not arbitrable).

B. *Southland*'s Basic Premise That the FAA Is Substantive Law Is Contradicted by this Court's Consistent Holdings Since 1985 That the FAA Is Fundamentally Procedural and Affects No Substantive Rights

A fundamental premise of *Southland* is that the FAA binds the states because it creates *substantive* rights. *See Southland*, 465 U.S. at 12 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983)) (FAA "'creates a body of federal substantive law' . . . applicable in state and federal courts"); 465 U.S. at 15 n.9 (FAA "creates federal substantive law"). Yet, in a consistent line of holdings on arbitrability of various statutory claims beginning in 1985, this Court has held, on the contrary, that the FAA's rule of enforcement of arbitration

agreements does not affect substantive rights. Rather, arbitration agreements are "in effect, a specialized kind of forum selection clause," *Rodriguez*, 490 U.S. at 482-83 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)), and a party compelled to arbitrate "does not forgo . . . substantive rights," but "only submits to their resolution in an arbitral, rather than a judicial, forum." *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *accord EEOC v. Waffle House*, 534 U.S. 279, 295 (2002) (arbitration agreement is "effectively a forum selection clause"); *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) ("by agreeing to arbitrate . . . a party does not forgo . . . substantive rights"). *Southland*'s determination that the FAA is substantive law traces back to *Wilko v. Swan*, 346 U.S. 427, 435-38 (1953), which held that arbitration affects substantive rights. That holding of *Wilko* was expressly overruled in *Rodriguez*, 490 U.S. at 481, which specifically held that the selection of an arbitral versus a judicial forum was merely "procedural." *Id.* at 482.

These holdings vitiate one of *Southland*'s two primary rationales for imposing FAA § 2 on the states: the purported need to impose a uniform federal rule to prevent forum shopping. *Southland*, 465 U.S. at 15.[9] Forum shopping is a concern only where the parties are able to shop for favorable *substantive* rules that are likely to affect the outcome. But because the enforcement *vel non* of the arbitration agreement should *not* affect the outcome of a case, there is no forum shopping problem – any more than with any forum selection clause, where the same substantive

[9] The other rationale for imposing § 2 on the states – the "national policy favoring arbitration" – is discussed in the following section.

law would be applied by the alternate fora. The possibility of a different arbitration-enforcement decision being made by a state court and a federal court in the same state should be no more troubling than is a situation where the state and federal courts would follow different conflict of laws rules in deciding whether to enforce a forum selection clause. The Court has found this very situation to be entirely unproblematic. *See Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988).[10]

[10] The notion that the FAA creates federal substantive law first appeared in dicta the term before *Southland*, in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983); *see Southland*, 465 U.S. at 24 (O'Connor, J., dissenting) (*Moses H. Cone*'s "dictum concerning the law applicable in state courts was wholly unnecessary to its holding"). Previously, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court had "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies[.]" *Southland*, 465 U.S. at 24 (O'Connor, J., dissenting) (quoting P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 731-732 (2d ed. 1973).) *Prima Paint* had addressed an apparent *Erie* problem in the FAA by holding that where, as here, Congress has commerce power to regulate substantively, Congress may exercise a lesser-included power to make procedural rules for federal courts in diversity cases ("prescribe how federal courts are to conduct themselves"), even if the procedural rule is "outcome determinative" in the *Erie* sense. *See Prima Paint*, 388 U.S. at 404-05. But this *Erie* problem has disappeared since *Southland:* by holding that the FAA does not affect substantive rights, this Court has dispelled any notion that the FAA is "outcome determinative" for *Erie* purposes. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, __ Law & Contemp. Probs. __ (forthcoming 2003), manuscript on-line at <http://www.law.wisc.edu/facstaff/pubs.asp?ID=453> [click on "FAA and Federalism Download"] 38-48.

C. *Southland*'s Imposition of a "National Policy Favoring Arbitration" on the States Intrudes on the State-Federal Balance, Raises Constitutional Doubts and Violates the Fundamental Federalism Principles Established in *Gregory v. Ashcroft*

Cases about arbitration agreements are fundamentally contracts cases, and contracts are an area of traditional state regulation which federal courts should be "reluctant to federalize." *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (quoting *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977)). Since *Southland*, scores of state laws have been held preempted or become subject to FAA preemption.[11] While this Court has held that Congress may exempt a certain kind of claim from

[11] Last year alone, state laws were held preempted under *Southland* in at least 16 cases. Erroneous extensions of *Southland*, such as that pressed by Green Tree here, account for many instances of preemption. In addition, even "correct" applications of the misbegotten *Southland* decision cut a wide swath through state law. For example, at least 30 states have one or more statutes containing antiwaiver provisions of the kind held preempted in *Southland*. Many states have tried to regulate arbitration agreements by creating specific exceptions to a general state rule of specific enforcement of arbitration agreements, but *Southland* preempts these laws. *See* Schwartz, *supra*, at 12-13, and App. A, B.

Preemption stifles state law experimentation not only by nullifying state laws on the books, but also by discouraging proposals to change the law. For example, the National Conference of Commissioners on Uniform State Laws was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act, but determined that "the preemptive effect of the Federal Arbitration Act, . . . dramatically limits meaningful choices for drafters addressing adhesion contracts[.]" NCCUSL, *Adhesion Arbitration Agreements and the RUAA* (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm.>

arbitration by an express provision or implication showing such an intent, *McMahon*, 482 U.S. at 220, *Southland* denies this authority to the states. *See, e.g., Perry,* 482 U.S. 483 (preempting Cal. Lab. Code § 229 preserving the judicial forum for state wage and hour claims). *Southland* is very much out of step with this Court's federalism decisions of the past decade: Its broad rule of preemption comes at a very great cost to state lawmaking autonomy, the primary value of federalism, but its purported federal justification is illusory.

1. *Southland*'s Effect of Restructuring State Dispute Resolution Processes Without the Justification of a Strong Federal Interest Raises Doubts about the FAA's Constitutionality

The effect of *Southland* is to restructure state dispute resolution processes for state law claims. *See Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting) (*Southland* entails "a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"). Cases in which a state would open its courts to litigants, are compelled into arbitration under *Southland*, irrespective of the presence of a substantive federal interest – that is, a federal interest other than an interest in the dispute resolution process itself.[12] The traditional means for Congress to guarantee certain procedures for federal claims is not to dictate procedure to state courts, but to create federal question jurisdiction to open the doors of the

[12] To the extent there is a federal interest in protecting arbitration for federal claims filed initially in state court, that interest is adequately protected, even without *Southland* preemption, by removal jurisdiction. *See* 28 U.S.C. § 1441.

federal courthouse to the claim. The authority of Congress to restructure state dispute resolution procedures for *federal* claims is far from clear. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1, 42-52 (1999) (canvassing federalism problems in federal regulation of state court procedures); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947 (2001) (same). Does the commerce power authorize Congress to restructure state dispute resolution processes for *state law* claims, even under the guise of "substantive" regulation of interstate contracts?

Imagine Congress passing an Expeditious Dispute Resolution Act of 2004. In the interest of the expeditious resolution of disputes involving contracts relating to interstate commerce, all such disputes in state court shall follow certain federally-mandated rules. First, no jury trial will be permitted; all such cases must be tried to the court. Second, state appellate courts may only reverse trial court judgments for "manifest disregard of the law." Third, denial of motions for summary judgment shall be immediately appealable, to the state appellate court, on an interlocutory basis, before the case is tried. The constitutionality of such a statute is doubtful at best. "We have made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997). In *Johnson*, this Court was unanimous in observing that "respect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." *Id.* at 922.

Yet *Southland* permits a federal restructuring of state dispute resolution procedures in very comparable ways. It does not matter, from a federalism standpoint, that the mechanism for this restructuring under the FAA, as opposed to the hypothetical "EDRA," relies on the mediating device

of a private contract. The EDRA could as well be written as an authorization to contracting parties – including parties to contracts of adhesion – to "agree" to an EDRA clause, and then providing as a matter of federal law that the EDRA clause will be "rigorously enforced" to bar jury trial, limit the grounds for appellate review, and permit interlocutory appeals of summary judgment denials. Yet the federal intrusion on state dispute resolution processes is in no way lessened by the presence of the contract term.

What exactly is the federal interest in restructuring state dispute resolution procedures for state law claims or, as in the case at bar, for dictating to a state whether its arbitrations of state law claims should proceed on an individual basis only or as a class action? It has become a commonplace to respond to this question merely by waving the flag of the so-called "national policy favoring arbitration," *Southland*, 465 U.S. at 10, as though that were an explanation.

When Congress displaces state dispute resolution procedures, in whole or in part, by creating exclusive jurisdiction in federal district courts, *e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78aa, or federal administrative tribunals, *e.g.*, National Labor Relations Act §§ 3, 10, 29 U.S.C. §§ 153, 160, it does so by asserting plenary *substantive* authority over a particular subject matter, and at least implicitly identifying a strong federal interest in that subject matter. *See* NLRA § 1, 29 U.S.C. § 151. Thus, for example, collective bargaining agreements, although private contracts in form, have long been regarded as contracts carrying national public policy implications, due to the history of labor strife. *See Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577-78 (1960).

The FAA, in contrast, evinces a Congressional intent to bring private contractual arbitration agreements into general contract law, not lift them out of it into a category

of special federal concern.[13] Not only has Congress failed, in the FAA or otherwise, to identify alternative dispute resolution as a matter of pressing national concern that must be imposed on all levels of government, but one searches the FAA in vain for any substantive federal policy that might be at stake in such matters as whether a state will keep its courthouse doors open to state law wage and hour claims.[14] Although the FAA identifies a federal nexus – contracts involving interstate commerce or admiralty – this Court has never found in the FAA an intent to assert plenary substantive authority over all such contracts, even those interstate commerce contracts containing arbitration agreements. The absence of substantive federal policy underlying the FAA explains why the FAA *does not even create federal question jurisdiction*. *See Southland*, 465 U.S. at 15 n.9.

---

[13] *Moses H. Cone*'s assertion of a federal pro-arbitration policy is based on an unsound analogy to labor arbitration. *See* Schwartz, *supra*, at 49-55, 59-60. *Compare Moses H. Cone*, 460 U.S. at 24 ("the effect of [FAA § 2] is to create a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the act"), *with Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450 (1957) (LMRA § 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements") *and Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (judicial role is that "of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements").

[14] If *Southland* was motivated by a lack of confidence in the states' ability to find their own way toward alternative dispute resolution, such mistrust of the states is not only inconsistent with federalism values, but also would have proven unjustified. Most states have, in general, rigorously enforced arbitration agreements and promoted non-binding ADR as well. *See* 5 Ian R. Macneil, et al. *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* app. I:41-44 (5th ed. 1994).

2. Federalism Principles Reaffirmed Since *Southland* Caution against Courts Finding Preemption in Reticent Statutes

The values of federalism, articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), provide a basis for evaluating *Southland*'s federalism error:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458; *accord United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *Gregory* as setting forth the "first principles" of federalism); *id.* at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states can serve as "laboratories for experimentation" in social policy)). Each of these values of federalism assumes a substantial degree of state lawmaking autonomy; none would have much meaning if the states were merely "regional offices [ ]or administrative agencies of the federal government." *New York v. United States*, 505 U.S. 144, 188 (1992).

Preemption doctrine represents the most significant and frequently applied limitation on substantive state autonomy in our constitutional scheme. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767, 768 (1994). While federal commerce power still potentially reaches most subjects of legislation even after *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), preemption doctrine holds that Congress may nullify state

law on any subject within federal legislative jurisdiction. Therefore,

> the true test of federalist principle may lie, not in the occasional effort to trim Congress's commerce power at its edges . . . or to protect a state treasury from a private damage action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law

– namely, preemption cases. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Recognizing this, decisions of this Court have held that federalism principles support a presumption against preemption: " 'where . . . the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (quoting *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *accord Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress"). In *Gregory*, the Court made this principle an even broader rule of statutory construction: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute." 501 U.S. at 460 (internal quotations omitted).

3. This Court's "Clear Statement" Rule Announced in *Gregory v. Ashcroft* Undermines Any Contention that *Southland* Properly Construes the FAA

Does the FAA include a "clear statement" of Congressional intent to preempt state law, as would be required under *Gregory*? No. It is widely recognized that the "national policy favoring arbitration" was not the creation of the FAA as written by Congress, but was instead a judicial creation – federal common law – that took the FAA as a point of departure. *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation"). As has been clearly demonstrated in two scholarly dissenting opinions from this Court, the *Southland* opinion flouted the FAA's historical record, which showed that Congress intended the FAA to be a procedural statute that neither applied in state court nor preempted state law. *See Southland*, 465 U.S. at 23-31 (O'Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 285-95 (Thomas, J., dissenting).[15] But even the *Southland* majority opinion conceded the absence of anything that would meet the "clear statement" test, by going outside the FAA's text to rely on a legislative history that was "not without ambiguities." 465 U.S. at 12. There is no question that were *Southland* being decided for the first time today, this Court would apply *Gregory* to reject the argument that the FAA is substantive law binding on the states.

[15] For additional historical evidence supporting the arguments in the O'Connor and Thomas dissents, *see* Schwartz, *supra*, at 19-31.

4. *Southland* Suffers from Constitutional Infirmities Comparable to *Swift v. Tyson*

Southland is not a garden variety error in statutory interpretation, where the Court can rely on Congress to clear up a disagreement over statutory intent. *Southland* is a major federalism error that attributes to Congress an intention to intrude on state autonomy to a degree that pushes the FAA to the limits of Congressional power, if not beyond, and thereby violates the precepts of *Gregory v. Ashcroft*. If it is an important attribute of this Court's role to correct the federalism mistakes of Congress, *see Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"); *Morrison*, 529 U.S. at 617 n.7, it seems paradoxical to say that the Court cannot correct its own – that only Congress should do so.

Special circumstances warrant overruling *Southland*. Stare decisis "is not an inexorable command. The instances in which the court has disregarded its admonition are many." *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).[16] Fourteen years later, a majority of the Court joined Justice Brandeis, in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to overrule a 96-year-old statutory interpretation precedent, *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842). *Erie* held that *the judicial interpretation* given to

[16] "Notwithstanding the rule [of statutory stare decisis], the Supreme Court has overruled or materially modified statutory precedents more than eighty times" between 1961 and 1988. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361, 1427-39 (1988).

§ 34 of the 1789 Judiciary Act by *Swift* – not the statute itself – was unconstitutional, because it allowed the federal courts to make law on subjects outside the legislative power of Congress. Although *Southland's* FAA is narrower in scope than the general federal law considered in *Erie,* its effect on the states goes deeper: federal common law under *Swift* was not applicable in state court, and state statutes could in effect overrule federal common law decisions. *See Erie*, 304 U.S. at 71 (quoting *Swift*, 42 U.S. (16 Pet.) at 10) ("positive statutes of the state" are rules of decision under § 34). But *Southland* holds that the federal common law of the FAA binds state courts and nullifies state statutes. Thus, *Southland*'s reliance on the FAA – a fundamentally procedural law – as a basis to create a body of federal judge-made law that preempts state lawmaking is arguably even more constitutionally unsound than *Swift.* It is time that *Southland* be overruled.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the South Carolina Supreme Court.

Dated: March 26, 2003

Respectfully submitted,

DAVID S. SCHWARTZ
(Counsel of Record)
RICHARD M. ALDERMAN
Attorneys for Amici Curiae
Law Professors